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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term 1979

JOHN GREGORY WATKINS,

Petitioner

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR SIXTH CIRCUIT
(AND APPENDIX)

Frank W. Heft, Jr.
FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

PAUL G. TOBIN
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I do hereby certify that a copy of this petition was served by depositing the same in a United States mail box, with first class postage prepaid, to Hon. Victor Fox, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on January 16, 1980.

Frank W. Heft, Jr.
FRANK W. HEFT, JR.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3-5
REASONS FOR GRANTING THE WRIT	6-21
CONCLUSION	22
APPENDIX	attached

TABLE OF POINTS AND AUTHORITIES

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935)	18, 19
Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978)	8
Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973)	19
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 257 (1973)	17
Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 623, 99 L.Ed.2d 942 (1955)	17-19
Dixon v. Commonwealth, Ky., 505 S.W.2d 771 (1974)	8
Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969)	7
Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 18 L.Ed.2d 1178 (1967)	7
Haskins v. United States, 433 F.2d 836 (10th Cir. 1970)	9
Hayes v. Commonwealth, Ky., 467 S.W.2d 354 (1971)	8
In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed.2d 942 (1955)	17
In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)	16
Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)	8
Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941)	17
Luckett v. Commonwealth, Ky., 550 S.W.2d 517 (1977)	8
Malley v. Connecticut, 414 F. Supp. 1115 (D. Conn. 1976)	19
Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974)	18

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) 8, 13

Myers v. Commonwealth, Ky., 489 S.W.2d 277 (1973) 8

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) 7,8

Pinto v. Pearce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967) 12

Pointer v. Texas, 380 U.S 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 17

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 16 L.Ed.2d 600 (1960) 17

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 8

Summitt and Watkins v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979) 1,5,12,20

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 908 (1964) 8

United States ex rel, Fisher v. Driber, 546 F.2d 18 (3rd Cir. 1976) 8, 12

United States ex rel. Phipps v. Follett, 428 F.2d 912 (2nd Cir.), cert. denied, 400 U.S.908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970) 9

United States v. Allison, 414 F.2d 407 (9th Cir.) cert. denied, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969) 9

United States v. Barker, 553 F.2d 1013 (6th Cir. 1977) 19

United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969) cert. denied, 396 U.S. 1017, 90 S.Ct. 581, 24 L.Ed.2d 508 (1970) 9

United States v. Cranson, 453 F.2d 123 (4th Cir. 1971), cert.denied, 406 U.S. 909, 92 S.Ct. 1067, 31 L.Ed.2d 821 (1972) 9

United States v. Mitchell, 540 F.2d 1163 (3rd Cir. 1976) 9

United States v. Raneiglo, 433 F.2d 228 (5th Cir.) cert. denied, 400 U.S. U.S. 959, 91 S.Ct. 358 27 L.Ed.2d 268 (1970) 9

United States. v. Sutherland, 428 F.2d 1152 (5th Cir. 1970) cert. denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972) 9

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 7,9,11,12

Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943) 18

Watkins v. Commonwealth, Ky., 566 S.W.2d 630 (1978) 1,5

STATUTE

28 U,S.C. §1254(1) 1

CONSTITUTIONAL PROVISIONS

Sixth Amendment 2

Fourteenth Amendment 2

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, John Gregory Watkins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the case on October 19, 1979.

OPINIONS BELOW

The trial court did not render a written opinion in this case. The judgments of conviction in the trial court were entered on July 15, 1977 and are reproduced in the Appendix at 21-22. The Kentucky Supreme Court affirmed the judgment of the trial court in Watkins v. Commonwealth, Ky., 556 S.W.2d 630 (1978). This opinion is reproduced in the Appendix at 19-20.

A petition for a writ of habeas corpus was filed in the United States District Court for the Western District of Kentucky at Louisville. The petition was dismissed in a memorandum opinion. The opinion and judgment entered by the the United States District Court are reproduced in the Appendix at 11-18. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court in Summitt and Watkins v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). The opinion and judgment of the United States Court of Appeals for the Sixth Circuit are reproduced in the Appendix at 1-9.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 and this petition for a writ of certiorari is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A STATE TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE AND DID THE FAILURE TO SUPPRESS THE IDENTIFICATION AFTER ITS UNRELIABILITY WAS DISCOVERED AT TRIAL DEPRIVE THE PETITIONER OF A FAIR TRIAL CONSONANT WTIH DUE PROCESS OF LAW?

II. DID THE CLOSING ARGUMENT OF THE PROSECUTOR DEPRIVE THE PETITIONER OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL BASED SOLELY UPON THE EVIDENCE AGAINST HIM?

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The petitioner, John Gregory Watkins, was indicted by the March 1975 term of the Jefferson County Grand Jury on one count of armed robbery and one count of first degree assault (Transcript of Record 153965 at p. 2, hereinafter referred to at TR 153965). The January 1977 term of the Jefferson County Grand Jury returned another indictment charging Watkins with one count of bail jumping. (Transcript of Record 158242 at p. 2, hereinafter referred to at TR 158242). On June 20 and 21, 1977, the cases were jointly tried before a jury.

The evidence for the prosecution tended to establish that on January 11, 1975 at approximately 11:30 p.m. an attempted robbery occurred at the Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith, an employee and part-owner, and Donald L. Goeing, Jr., were working in the store when three or four black males entered the store (Transcript of Evidence p. 21, 51, hereinafter referred to as TE). Smith testified that one of them approached the counter, asked for a pack of cigarettes, and when Smith turned around, said "this is a hold up." (TE 21). Goeing was refilling the soda machine at this time, and when the assailant saw some movement in that direction, he stated: " I said don't reach for anything" and fired two shots at Goeing (TE 23-24). One shot hit Goeing in the arm and the other went through the right ventricle of his heart (TE 48). Goeing was hospitalized for twelve days and recovered after a three and a half month convalescence (TE 48).

The evidence against Watkins was based solely on identifications made by Smith and Goeing (TE 21, 47-48). Defense counsel submitted a written pre-trial motion for a suppression hearing on the identification testimony (TR 153965, 28-29). Before any evidence was heard, this motion was reasserted in court, out of the presence of the jury, and was

overruled (TE 2, 9). Prior to testimony and identification by Smith and Goeing, defense counsel objected to not being allowed an in camera hearing, since it forced him to explore the circumstances of the line-up and show-up in the presence of the jury (TE 24), but his objections were overruled (TE 21,24). Repeatedly defense motions for a mistrial on the same basis were overruled (TE 24, 28, 98). A review of the identification testimony at trial follows.

Smith gave a description to the police on the evening of January 11, 1975, which described the assailant as a light-skinned black male, thirty-five years old, approximately five feet, nine inches tall (TE 34-35). According to his testimony, Goeing saw his assailant for about five seconds before he lost consciousness (TE 49-51). On the day of his arrest, Watkins was placed in a three man lineup with two dark-skinned black males and identified by Smith (TE 41-43). Smith testified that at the time he made the identification he "wasn't completely sure" but that later on, when he "got himself together," he was sure (TE 43). Watkins was then taken to the hospital in the custody of two police officers to be viewed by Goeing in his hospital bed. Goeing had been informed that the police were "going to let him see someone that he could identify." (TE 54-55). Goeing testified that, at the time of his identification, he stated: "...it could have been close enough that it could have been his twin brother, it could have been somebody else." (TE 55). Goeing stated that he had seen Watkins nine or ten times in court since that time (TE 55). No other arrests were made in the case, and no photographs or other possible suspects were shown to Smith and Goeing (TR 71,74).

Watkins took the stand in his own behalf and testified that he had not been involved in the crime (TE 122, 124). Watkins stated that on the evening in question he had played pool with David English and Gerald Redman. He then spent the remainder of the night with English, who was his cousin (TE 123) Watkins' whereabouts were confirmed by the testimony of David

English and Gerald Redman (TE 99-113). Anthony Dove was also called by the defense and testified that he was in Thoroughbred Liquor Store on the evening of January 11, 1975, and that Watkins was not the man who shot Donald Goeing, Sr. (TE 116-117).

In closing argument, the prosecutor stated that, by finding Watkins guilty and giving him the maximum sentence, the jury could get "the message across" from "the Governor on down, that we don't want this man or men like him in our community " (TE 175). The defense objected to this line of argument as inflammatory and was overruled (TE 176). The prosecutor then proceeded to exhort the jurors: "This is your chance to get them out of here. This is your chance " (TE 176). He concluded with the statement: "Don't think this is being harsh. This is the only way you can get the message across. These babies are tough " (TE 178). At the conclusion of its thirty minute deliberation, the jury returned a verdict of guilty on all counts and recommended the maximum sentence on each count (TE 180-181).

The judgment of the trial court was affirmed by the Supreme Court of Kentucky in Watkins v. Commonwealth, Ky., 565 S.W. 2d 630 (1978). A petition for a writ of habeas corpus was filed, pursuant to 28 U.S.C. § 2254, with the United States District Court for the Western District of Kentucky at Louisville. The petition for a writ of habeas corpus was dismissed by the district court and the United States Court of Appeals affirmed the dismissal in Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). This petition for a writ of certiorari is from the order of the United States Court of Appeals affirming the petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS NOT SPECIFICALLY ADDRESSED THE QUESTION OF WHETHER CONSTITUTIONAL DUE PROCESS OF LAW REQUIRES A STATE TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE. FURTHERMORE, THERE APPEARS TO BE A CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS ON WHETHER SUCH A HEARING IS CONSTITUTIONALLY REQUIRED. THE CASE AT BAR REFLECTS THE NECESSITY TO RESOLVE THIS ISSUE.

At trial, after the jury was sworn but prior to the opening statements in the case, counsel for John Watkins moved for an in camera hearing to review the suggestive procedures by which Watkins was identified (TE 11). This motion was overruled. Subsequently, the in-court identification was admitted over the objection of defense counsel (TE 21). A short time later, when Watkins' counsel cross-examined the prosecuting witness, he articulated for the record his need for a hearing and the prejudice he felt in the denial of his motion by the court (TE 24):

> MR. SOUTHARD: I'm going to have to explore testimony of the line-up and the show-up that I feel like I shouldn't have to do in front of the jury. And I just want to again make my objection for the record to not being allowed to have a hearing.

Defense counsel again reiterated this objection after his cross-examination of the second prosecuting witness. (TE 58):

> MR. SOUTHARD: Your Honor, prior to the testimony of these two witnesses, I made an objection. And I would again renew my objection to having to bring out that testimony and move for a mistrial.

At the close of the prosecution's case, counsel for Watkins once again renewed his motion (TE 93):

> ...I would also move for a mistrial based on the admission of the identity testimony without allowing an out of court hearing as to that testimony, especially since he was not represented at the line-up by counsel.

Finally, at the close of the defense, counsel renewed his previous motion (TE 144). All of these motions were overruled.

In Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), at 388 U.S. 272, the court addressed the problem of identification testimony and held that the "admission of in-court identification without first determining that they were not tainted by the illegal line-up but were of independent origin was constitutional error."

In a more general manner, the procedures to be used in determining the admissibility of identification testimony have been developed in a series of Supreme Court decisions, beginning with United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). If a hearing to determine the admissibility of an identification is not held, the court noted in Wade, at 388 U.S. 240, 87 S.Ct. 1939:

> The state may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself - realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal the unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification.

In Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), the court held that the "totality of the circumstances" surrounding a pretrial identification should be scrutinized by the trial court to ensure that the identification was not so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process. Refining this standard in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the court said, at 409 U.S. 200, 93 S.Ct. 382:

> . . . .the facts to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation.

In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the court reiterated that "reliability is the linchpin in determining the admissibility of identification testimony" and that the facts to be considered are those set out in Biggers. Implicit in all of these holdings is that the admissio of the in-court identification without first determining that it was not tainted was constitutional error. See also Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Dixon v. Commonwealth, Ky., 505 S.W.2d 771 (1974). If the initial confrontation is constitutionally impermissible, then all subsequent identifications are also subject to attack. Hays v. Commonwealth, Ky., 467 S.W.2d 354 (1971).

In the case at bar, when trial counsel contested the admissibility of the identification, due process required a reliable determination of the disputed fact. Procedurally, the test of reliability has been interpreted as requiring a hearing out of the presence of the jury. In Kentucky, this preferred procedure has been enunciated in Luckett v. Commonwealth, Ky., 550 S.W.2d 517 (1977); Myers v. Commonwealth, Ky., 499 S.W.2d 277 (1973); and Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978).

In United States ex rel Fisher v. Driber, 546 F.2d 18 (3rd Cir. 1976), the court felt obligated to "follow the mandate of the Jackson[1] court in determining that Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1962), requires an evidentiary hearing at the state level to determine the factual complex in which the challenged identification was made." The court in Driber went on to say, at 546 F.2d 21:

1. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 908 (1964)

A similar test was formulated for the Ninth Circuit by Judge (now Chief Judge) Browning in Allison:

> [W]here a timely and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identification procedures, it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained.

414 F.2d at 410. Accord, United States v. Mitchell, 540 F.2d 1163 (3d Cir. 1976). See also United States ex rel. Phipps v. Follette, 428 F.2d 912, 913 n. 1 (2d Cir.), cert.denied, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970); United States v. Cranson, 453 F.2d 123, 125-26 (4th Cir. 1971), cert.denied, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); United States v. Sutherland, 428 F.2d 1152, 1155 (5th Cir. 1970), cert.denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972); United States v. Broadhead, 413 F.2d 1351, 1359 (7th Cir. 1969), cert.denied, 396 U.S. 1017, 90 S.Ct. 581, 24 L.Ed.2d 508 (1970); Haskins v. United States, 433 F.2d 836, 838-39 (10th Cir. 1970). Cf. United States v. Raneiglio, 429 F.2d 228, 230 (8th Cir.), cert.denied, 400 U.S. 959, 91 S.Ct. 358, 27 L.Ed.2d 268 (1970).

In the case at bar, counsel for Watkins was well aware of the Wade dilemma of "bolstering the courtroom identification by bringing out and dwelling upon his prior identification during cross-examination of the prosecuting witness". See Wade, supra, at 338 U.S. 240, 87 S.Ct. 1939. Indeed, defense counsel objected strenuously to the necessity of using this technique and to the prejudice inherent in it. However, despite his objections, he was forced to delve into the circumstances of the identifications in the presence of the jury.

The evidence in this case reveals various factors which should have been reviewed by the trial court to determine the existence of possible taint. A review of these factors follows.

(1) Neither of the eyewitnesses had much of an opportunity to view the assailant. Walter Smith stated that he only saw the fact of the man when he turned around from getting the cigarettes. The shots were immediately fired and the man ran out (TE 32,33). It happened so quickly that Smith did not even have time to get the money out of the cash register (TE 32). Furthermore, Smith described the man as being about thirty-five years old, and Watkins was only seventeen at the time. Goeing testified that he saw the man's face for about five seconds as he turned around from the soda machine. Shots were then fired, and he passed out (TE 51,51). Both witnesses stated that the assailant was a stranger and they had no reason to pay any particular attention to him (TE 24, 49). He was just another customer until he stated that "this is a hold-up." The interval between the time this statement was made and the time the man ran out of the door was a matter of seconds. Thus, the opportunity for observation was minimal at best.

(2) The three- man line-up was extremely suspect because it involved only one light-skinned black male. This was one of the few physical characteristics which Smith had described to police. The fact that Smith was not sure of his identification at that time, but became sure when he "got himself together," suggests that later in-court appearances with Watkins had the effect of strengthening his previously doubtful identification. The fact that he was not presented with any other possible suspects fitting the description, either by line-up or photograph, may have pressured Smith into identifying Watkins, particularly if he was aware of the fact that Goeing had identified Watkins as the man.

(3) The show-up in the hospital was also suspect. The circumstances suggest that, when Goeing identified Watkins, he expected to see the man who had shot him. Goeing was aware that a man was being brought to his hospital bed in the custody of the police to be identified. He viewed no other suspects but Watkins, a young, light-skinned black male, obviously suspected by the police. The circumstances of the identification were

clearly suggestive and prejudical. Goeing also expressed some doubt at the time of this identification. He said it was close enough that it could have been his twin brother, but it "could have been someone else," (TE 55). This doubt was predictably diminished with each court appearance or proceeding that involved Watkins as the criminal defendant. The district court below provided an excellent overview of exactly the type of prejudice which confronted Watkins when it noted at Appendix 11-12.

> Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified by Goeing as the person who had fired the shots, and that this identification was reinforced in Goeing's mind by having seen petitioner several times while awaiting the call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a line-up two days after the robbery and there was shown three or four black males. He identified the petitioner at the line-up, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later said that after he got himself together, he knew that petitioner was the man.

The District Court relied heavily on the extensive cross-examination of the prosecution's witesses to reaffirm the lack of suggestiveness of the identification. However, since Watkins' counsel was aware of the problem, there was necessarily an element of restraint involved which precluded a thorough examination. Watkins' counsel felt restricted by the inherent prejudice of blind cross-examination. Thus, he was put in the untenable position of trying to protect Watkins as much as possible from the intrusion of prejudicial, perhaps inadmissible evidence, while at the same time seeking to discover facts about an identification of which he had no prior knowledge. Regardless of the guarded nature of the cross-examination, it unavoidably resulted in the same type of bolstering which Wade condemns and which could have been avoided if a suppression hearing had been held.

In Summitt and Watkins v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979) the Court of Appeals concluded that:

> . . .as applied to identification evidence, Jackson v. Denno, supra and Pinto,[2] supra, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

Since the defense counsel was forced to explore the reliability of the identification on cross-examination in the presence of the jury, it cannot be found that such a procedure constituted an adequate hearing on the reliability and admissibility of the identification evidence. The utilization of such a procedure places defense counsel in precisely the untenable position envisioned in Wade v. United States, supra. While trying to challenge the reliability of the identification in the presence of the jury, defense counsel runs the inherent risk of causing irreparable prejudice to his client by unavoidably bolstering the courtroom identification through cross-examination. This is an inevitable result of the hearing deemed adequate by the Sixth Circuit in Summitt v. Bordenkircher, supra.

The Third Circuit's decision in United States ex rel. Fisher v. Driber, supra, is in direct conflict with the Sixth Circuit's decision in Summitt v. Bordenkircher, supra. Analogizing the principles enunciated in Jackson v. Denno, supra, to Fisher, the Third Circuit concluded that a state trial court is constitutionally required to conduct a hearing out of the presence of the jury on the reliability and admissibility of identification evidence where the request for such a hearing is not a frivolous one. The case at bar presents a serious question of identification. By denying an in camera hearing

2. Pinto v. Pearce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967).

on the reliability of the identification evidence, the state trial court forced the issue to be resolved in the presence of the jury. Prejudice from such a procedure can be presumed by the maximum sentence imposed on the petitioner.

The Manson court articulated these factors at 97 S.Ct. 2253:

> . . . .the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainity demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

While it is true that this kind of consideration was afforded Watkins in the courts below there is less potential for prejudice to the defendant if these factors are considered in the setting of a suppression hearing. This determination must be made at the trial level to afford the defendant his right to effective counsel, as well as to insure his right to a fair trial.

By contrast in the case at bar, the reviewing courts below have attempted to determine the reliability of the identification retrospectively. Such a retrospective ruling can only hypothesize about questions which might have been asked, but were not because of the presence of the jury. Moreover, such a retrospective determination completely ignores the prejudice to the defendant which results from his being required to test the identification through blind cross-examination at trial. It is virtually impossible at the appellate level to determine what price the defendant has paid for his efforts to expose a suggestive identification. Although it may appear to a reviewing court that there has been "extensive trial cross-examination," the most telling cross-examination questions may not have been asked because of the fear of damaging answers. Consequently, post-conviction findings do not provide a reliable substitute for a suppression hearing at the trial hearing.

In conclusion, the failure of the trial court to grant a prior incamera hearing on the identification by the eye-witnesses prejudiced Watkins in two ways. First, at the trial level, the lack of a hearing resulted in truncated cross-examination of the prosecution witnesses and the bolstering of their in-court identifications by defense counsel. Second, at the appellate level it provided the court with an incomplete record of the proceedings on which to predicate the finding of a lack of prejudice. Under the circumstances presented, nothing short of a contemporaneous hearing could have satisfied Watkins' right to a fair trial consonant with due process of law. Because of the possibility of suggestiveness in the pre-trial confrontations, the denial of a prior incamera hearing on the identification by the eyewitnesses deprived Watkins of a fair trial in accordance with due process of law. In the alternative, the failure to suppress the identification after its unreliability was discovered at trial denied Watkins a fair trial.

II. THIS COURT HAS INDICATED THAT A PROSECUTOR'S CLOSING ARGUMENT CAN DEPRIVE A DEFENDANT OF HIS CONSITUTIONAL RIGHT TO A FAIR TRIAL. IN THE CASE AT BAR THE PROSECUTOR'S REPEATED INJECTION TO EXTRANEOUS MATTERS INTO HIS CLOSING ARGUMENT WAS SO PREJUDICIAL AS TO DENY THE PETITIONER HIS CONSITUTIONAL RIGHT TO A FAIR TIRAL CONSONANT WITH DUE PROCESS OF LAW. THE CASE AT BAR REFLECTS THE NECESSITY FOR THIS COURT TO PROMULGATE STRICT GUIDELINES IN ORDER TO CURB ABUSES IN THE CLOSING ARGUMENT WHICH DENY CRIMINAL DEFENDANT A FAIR TRIAL.

In the case at bar, the prosecutor repeatedly encouraged the jury to rely on extraneous matters in its deliberations, with the apparent sanction of the court. Furthermore, the

argument of the prosecutor was so blatant an appeal to passion and prejudice as to deprive Watkins of his constitutional right to a fair trial consistent with due process of law.

In his summation, the prosecutor delivered a tempestuous commentary on the sociological and psychological framework of criminals in general. His comments attempted to convince the jurors that they would be doing their duty as citizens of this community to return a conviction. The prosecutor made the following remarks over objection (TE 174-175):

> MR. ZOLLINGER: ...I don't like to see anybody go to the penitentiary. The reason I don't like to see that is because they have to be there with people exactly like themselves. When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in. He doesn't belong in the community where people go to work every day.
>
> MR SOUTHARD: Your Honor, I'm going to object. I think this argument is out of the context of the evidence.
>
> THE COURT: Overrule the objection.
>
> MR. SOUTHARD: Thank You.
>
> MR ZOLLINGER: He belongs in a community of people like himself, not out here where he's confrontating people who work for a living, that don't go around patking guns, that aren't going into places where other people are working and pointing a gun at them and confronting them with death. That's strictly the conditions.

> The only way that we can have any effect on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community. We want him out of here. And the only way you can get that message across is by fixing the sentences as long as you possible can fix them. Fix those sentences so long that this man will be off the streets as long as we possible can keep him off the streets. (Emphasis added)

Defense counsel renewed his objection and was overruled (TE 176). The prosecutor then proceeded to ask the jurors (TE 176):

> MR ZOLLINGER: And the kind of community that you will live in, that your children will live in, and your grandchildren will live in...I don't think you would prefer to have a community with people like this in it. This is your chance to get them out of here. This is your chance. (Emphasis added)

In conclusion, the prosecutor enforced his earlier comments by repeating (TE 178):

> MR. ZOLLINGER"...don't think this is being harsh. This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them. (Emphasis added)

In addition to these comments, the prosecutor misstated the evidence (TE 169):

> MR ZOLLINGER: ...You know what the alibi witnesses said...One man said there was a girl with them and the other one said there wasn't.

According to the record, both witnesses unequivocally testified there was no girl involved (TE 107.113).

The remarks by the prosecutor inferred that, by returning a verdict of guilty, the jurors would be doing their duty as parents, grandparents and hard-working citizens, ridding the community of dangerous criminals. The prosecutor asked the jury to contribute to the "cleaning up" of society by isolating in the penitentiary all those who have "no respect for the lives and rights of others." He sought a maximum sentence against Watkins to serve as an example to other criminals and to "the Governor on down," that "we don't want this man or men like him in our community." (TE 175). The effect of this argument was to give the jury additional issues to take into the jury room other than those raised by the evidence.

The Sixth Amendment to the United States Constitution guarantees every defendant a trial by an impartial jury and the right to be confronted by the witnesses against him. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). These

rights are guaranteed to state defendants as a matter of due process of law under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The guarantee of a fair trial is implicit in the concept of due process of law. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

The effect of the constitutional guarantee enunciated in the aforementioned cases has been aptly summarized by the Supreme Court in the case of In re Murchinson, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) when it said:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of acutal bias in the trial of cases. But our system of law has always endeavored to prevent its function in the best way "justice must satisfy the appearance of justice." Id. at 349 U.S. 136, 755 S.Ct. 625, 99 L.Ed. 946 (citations omitted).

In Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the court intimated that a statement by a prosecutor outside the record could very well in and of itself constitute a denial of due process of law and violate a defendant's right of confrontation, and such aggravated misconduct by a prosecutor in his closing argument may amount to a denial of a defendant's fundamental right to a fair trial. Id. at Fn. 23, 416 U.S. 648-49, 94 S.Ct. 1873, 40 L.Ed.2d 431.

The standard for review with regard to allegations of due process violations in habeas corpus proceedings was set out in Donnelly at 416 U.S. 642, 94 S.Ct. 1871, 40 L.Ed.2d 431:

> The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." We regard this observation as important for not every trial error or infirmity which might call for application of supervisory power correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941).

Naturally, it is impossible to recreate, on the written page, the full impact and emotion of the prosecutor's argument. Nonetheless, the cumulative effect of the prosecutor's misconduct denied Watkins a constitutionally fair trial and consequently deprived him of due process of law.

The prosecutor's comments and conduct during closing argument were neither isolated nor ambiguous, as were the statements in Donnelly v. DeChristoforo, supra. Rather, they were intentionally designed to inflame the jury by bringing before it matters outside the record. The prosecutor deliberately strived to deflect the jury's attention from matter legitimately before it.

In Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), it was held that improper argument by the prosecutor could preclude a defendant from receiving a fair trial and thereby violate due process:

> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be truthfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they rproperly carry none. Id. at 295 U.S. 88, 55 S.Ct. 633, 79 L.Ed. 1321.

The unique role of the prosecutor as representing the state inherently lends substantial credence to his words and actions. Consequently, when the prosecutor during closing argument embarks on a course of conduct designed to create prejudice against a defendant, he renders the concept of fair trial to be nothing more than fiction. See Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943).

Several federal courts have recognized the growing constitutional problem of inflammatory summations by prosecutors. In Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974), the court

stated that inflammatory comments require an evidentiary hearing on the issue in accordance with the fair trial standard set forth in Donnelly v. DeChristoforo, supra. Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) discusses the problem created when the prosecutor makes personal speculations or impassioned pleas for safe streets:

> We are mindful of the fact that federal courts do not sit as courts of errors and appeals when a state prisoner seeks federal habeas corpus. At the same time, we cannot ignore our responsibility to insure that an accused obtain a fair trial by an impartial jury. As the Supreme Court has reinterated time and again, "[e]xercise of calm and informed judgment by...[a jury's] members is essential to proper enforcement of law." Highly prejudicial remarks uttered by the prosecutor jeopardize the jury's deliberative process and hence infringe upon an accused's right to a fair hearing on the merits of the case. Id at 483 F.2d 1040, [Footnotes omitted].

In United States v. Barker, 553 F.2d 1013 (6th Cir. 1977), the court, citing Berger, supra, noted that while the prosecutor is allowed some latitude in summation, it is beyond the bounds of propriety for him to suggest that unless a particular defendant is convicted, maintenance of law and order in the community would be impossible. In that case, the prosecutor said at 1025:

> Mr. Barker's attorney admits that these defendants are not desirable people, that they're undesirable people. now, I submit to you that desirable people don't rob banks; undesirable people do rob banks, and they admit that they're undesirable. Because they're undesirable doesn't mean they robbed this bank, but you should consider that also along with all this other evidence.
>
> I submit to you that if you can't take this evidence and find these defendants guilty on this evidence that we might as well open all the banks and say, "Come on and get the money, boys, because we'll never be able to convict them."

The court found that, on the basis of these remarks, the prosecutor failed to comply with the obligation set out by the Supreme Court in Berger, supra.

Similarly, in Malley v. State of Connecticut, 414 F.Supp. 1115 (D.Conn 1976), the court held that a prosecutor who had made numerous remarks associating the defendant with an unpopular or feared group, and who told the jurors that by convicting the defendant they could in effect stamp out the drug problem, deprived the defendant of a fair trial consonant with due process of law.

In the case at bar, the prosecutor was allowed, over objection, to make damaging comparisons and personal comments about matters outside the record which were not subject to cross-examination by the defense. By so doing, the prosecutor deprived Watkins of his right of confrontation and his right to a fair and impartial trial consonant with due process of law. Specifically, this was accomplished by (1) commenting on extraneous matters not properly before the court which were not subject to cross-examination, rebuttal or any form of retaliation, (2) suggesting that the conviction of Watkins will help clean up society of an undesirable criminal element, (3) suggesting that the jury has a duty to "send a message" on behalf of the citizens of Jefferson County to the "Governor on down" that people like Watkins are not wanted in this community, (4) suggesting that the jury has a duty to the community and their families to make an example of Watkins for the protection of society in general, and (5) attacking the case for the defense by misstating the evidence on the record.

In its opinion, the district court held that Watkins did not meet the burden of showing that the remarks of the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process. However, the court did note that at Appendix 17.

> In evaluating the remarks of a prosecutor, the question of whether or not his conduct so infects the trial with unfairness as to make the resulting conviction the denial of due process is not always easy of resolution. This is the case here, since the prosecutor did make several rather emotional remarks about the alleged duties of the jury to cleanse the community of the criminal element who "go around packing guns".

The Sixth Circuit also noted the impropriety of prosecutor's closing argument. Summitt and Watkins v. Bordenkircher, supra 608 F.2d at 253.

In Malley, supra, the court said at 1120:

> While it is impossible to establish with certainty whether, but for the misconduct of the prosecutor, the jury would have returned a different verdict, it is possible to state that, on its merits, the case against the petitioner was a close one. The State's case consisted solely, of the testimony
>
> of the two officers, and they disagreed on the critical issue of the time of the alleged sale and were contradicted by their own report on their identification of the petitioner's automobile license number. On the other hand, the petitioner was able to marshal impressive evidence on his own behalf.

Likewise in the case at bar, the Commonwealth rested its case on the questionable identification testimony of two prosecuting witnesses, while the defense introduced evidence to substantiate both the fact that Watkins was elsewhere at the time of the robbery, and eyewitness testimony to the effect that Watkins was not one of the individuals involved. The fact that the jury returned a maximum sentence on all counts illustrates the impact of these comments. The prejudicial and inflammatory nature of the closing argument by the prosecutor deprived Watkins of substantial constitutional rights. Therefore, he must be granted relief from the ensuing conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, that this Court should issue a writ of certiorari, and review the rulings of the courts below.

Frank W. Heft, Jr.
FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

PAUL G. TOBIN
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

IN THE SUPREME COURT

OF THE UNITED STATES

JOHN GREGORY WATKINS,
Petitioner

V. NO._____

DONALD E. BORDENKIRCHER, WARDEN,
Respondent

INDEX TO THE APPENDIX

Item	Page
Opinion of the United States Court of Appeals for the Sixth Circuit rendered on October 19, 1979	1-8
Judgment entered by the United States Court of Appeals for the Sixth Circuit on October 19, 1979	9
Docket Entries in the United States District Court for the Western District of Kentucky	10
Memorandum Opinion of the United States District Court for the Western District of Kentucky rendered on September 28, 1978	11-17
Order entered by the United States District Court for the Western District of Kentucky on September 2, 1978	18
Opinion of the Supreme Court of Kentucky rendered on May 2, 1978	19-20
Judgment No. 153965 entered in Jefferson Circuit Court on July 15, 1977	21
Judgment No. 158242 entered in Jefferson Circuit Court on July 15, 1977	22

James Willard SUMMITT,
Petitioner-Appellant,

v.

Donald E. BORDENKIRCHER, Warden,
Kentucky State Penitentiary,
Respondent-Appellee.

John Gregory WATKINS,
Petitioner-Appellant,

v.

Donald E. BORDENKIRCHER, Warden,
Kentucky State Penitentiary,
Respondent-Appellee.

Nos. 78-3415, 78-3587.

United States Court of Appeals,
Sixth Circuit.

Argued June 5, 1979.

Decided Oct. 19, 1979.

On appeals from orders of the United States District Court for the Western District of Kentucky, Thomas A. Ballantine, Jr., J., and Charles M. Allen, J. denying state prisoners' petitions for writ of habeas corpus, the Court of Appeals, Bailey Brown, Chief Judge, held that it is not a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence, even though a hearing outside the jury's presence is preferable.

Affirmed.

Merritt, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐266(3.5)

It is not a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence, even though a hearing outside the jury's presence is preferable. U.S.C.A.Const. Amends. 5, 14.

2. Constitutional Law ⇐266(3.2)
Criminal Law ⇐641.2

A defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings, but even where the right to counsel is not applicable, due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. U.S. C.A.Const. Amends. 5, 14.

3. Criminal Law ⇐339.9(1)

Whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

4. Criminal Law ⇐339.9(2)

Among the factors relevant to the reliability of identification evidence are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated by him at the confrontation, and the length of time between the crime and the confrontation.

5. Criminal Law ⇐339.7(1)

Under some circumstances, the use of a photographic display may enhance the possibility of misidentification, but each case must be considered on its own facts.

6. Criminal Law ⇐339.7(1)

In respect to the pretrial photographic identification of rape defendant, there was no substantial likelihood of misidentification by reason of the introduction at trial of the victim's pretrial identification, since the pretrial identification could not be characterized as either suggestive or unreliable; the victim had ample opportunity to study her assailant, she provided the police with a detailed and accurate description, and soon after the attack she identified defendant from among a multitude of police photographs that were presented in a neutral fashion.

7. Criminal Law ⇐339.8(2)

A showup is inherently suggestive.

8. Criminal Law ⇐339.8(1)

When only one person is presented to a witness, there is a natural tendency for the witness to feel obligated to provide a positive identification, but in some cases a showup becomes a necessary identification procedure.

9. Criminal Law ⇐339.8(5)

Identification of defendant by robbery victim at showup was not so unreliable as to create a substantial likelihood of misidentification, where the showup, rendered necessary by the seriousness of hospitalized robbery victim's wounds, was conducted in a manner that did not take advantage or augment its inherent suggestiveness, where the victim had had a clear, albeit brief, opportunity to view the person robbing the liquor store, and where the identification at the showup reflected an element of uncertainty, but that element was very small.

10. Criminal Law ⇐339.8(2)

Unlike a showup, a lineup need not be and should not be unduly suggestive.

11. Criminal Law ⇐339.8(2)

Unnecessary suggestiveness in a lineup does not, by itself, require the exclusion of the identification as long as it contains sufficient indicia of reliability.

12. Criminal Law ⇐339.8(4)

Based on the totality of the circumstances, lineup identification of defendant by liquor store robbery victim was sufficiently reliable that there was no substantial likelihood of misidentification, even though the lineup was suggestive in that defendant was of a somewhat lighter complexion than the other two persons in the lineup.

13. Constitutional Law ⇐266(3.2)

A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders the trial unfair. U.S.C.A.Const. Amends. 5, 14.

14. Criminal Law ⇐741(2)

As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given identification evidence.

15. Constitutional Law ⇐268(8)

While several of the prosecutor's closing remarks, concerning defendant's character and the threat to the community, were improper, they were not so pervasive nor so prejudicial as to deny defendant due process. U.S.C.A.Const. Amends. 5, 14.

16. Criminal Law ⇐713

Point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case.

Terrence R. Fitzgerald, Chief App. Defender, Louisville, Ky. (Court-appointed), for petitioner-appellant.

John Gregory Watkins, pro se.

Robert F. Stephens, Atty. Gen. of Kentucky, Victor Fox, Asst. Atty. Gen., Frankfort, Ky., for respondent-appellee.

Before LIVELY and MERRITT, Circuit Judges, and BROWN,* District Judge.

BAILEY BROWN, Chief District Judge.

[1] These two appeals were consolidated for the purpose of considering whether it is a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence. We conclude that such a hearing is not constitutionally required and that the introduction of identification evidence in these cases did not violate due process standards. Accordingly, we affirm the decisions of the district courts.

The petitioner, James Willard Summitt, was indicted for rape on September 19, 1974. The rape occurred in Jefferson Coun-

* Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

ty, Kentucky late in the evening of July 20, 1974 when two men forced the victim, Donna Jean Furgason, into their car. The incident took place over a period of approximately forty-five minutes.

On July 21, 1974, Ms. Furgason reported the rape to the police. She described her assailant as a white male in his thirties, approximately five feet nine inches, 180 pounds, with tattoos on both arms. She looked through approximately twelve volumes of photographs at the county police headquarters in an attempt to identify the person who had raped her. Two days later, she was taken to the city police headquarters to review additional volumes of photographs. At that time, she identified a photograph of James Willard Summitt.

Prior to trial, Summitt moved to suppress any in-court identification by Ms. Furgason and requested a hearing out of the presence of the jury to determine the admissibility of the identification evidence. That motion and request were denied.

At trial, both the pretrial photographic identification and an in-court identification were introduced. At the conclusion of the evidence, the jury returned a verdict of guilty and recommended life imprisonment. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

The petitioner, John Gregory Watkins, was indicted in March, 1975 for armed robbery and assault. The robbery took place at a liquor store in Louisville, Kentucky. During the course of the robbery, an employee in the store was shot in the wrist and in the heart.

Donald Goeing, the employee who was shot, described the robber as a young, black man with a light complexion. Walter Smith, the other employee in the store, described the robber as a black man with a light complexion, thirty to thirty-five years old, and approximately five feet, nine inches tall.

Two days after the robbery, Walter Smith viewed a lineup consisting of three black men, one of whom was the petitioner Watkins. Watkins had a lighter complexion than either of the other two men in the lineup, though none of them had a particularly dark complexion. Smith identified Watkins but admitted that he was not "completely sure" that Watkins was the person who robbed the store.

On the same day, Watkins was taken to the hospital room where Donald Goeing was recovering from his wounds. Goeing identified Watkins, but at the same time he stated that "it could have been close enough that it could have been his twin brother, it could have been somebody else."

Prior to his trial, Watkins filed a motion seeking a pre-trial hearing on the admissibility of the identification evidence. The trial judge denied the motion.

At the trial, the prosecution relied on the in-court identifications of Watkins by both Smith and Goeing. On cross-examination, the circumstances surrounding both the lineup and the showup were brought out. Moreover, both Smith and Goeing admitted having seen Watkins in the courtroom on several occasions prior to trial. At the conclusion of the prosecutor's proof, the trial court denied Watkins' motion for a mistrial based on the introduction of the identification evidence. The jury returned a verdict of guilty and recommended the maximum sentence. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

[2] In both of these cases, the central dispute at trial was over the identification of the person who committed the crime. In every criminal trial, there exists some danger of misidentification. That inherent danger, however, is significantly increased whenever the identification is tainted by unnecessary and unduly suggestive procedures. To deter the use of suggestive identification procedures, the Supreme Court has held that a defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). *See also Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977);

United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Even where the right to counsel is not applicable, however, "due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois, supra*, 434 U.S. at 227, 98 S.Ct. at 464. It is this latter due process protection which the petitioners claim was violated in their state trials.

The initial issue presented by these appeals is whether the admissibility of identification evidence must be determined at a hearing outside the presence of a jury. We have no doubt that such a procedure is the preferable one. See *Nassar v. Vinzant*, 519 F.2d 798 (1st Cir.), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 132 (1975). *See also United States v. Poe*, 462 F.2d 195 (5th Cir. 1972), *cert. denied*, 414 U.S. 845, 94 S.Ct. 107, 38 L.Ed.2d 83 (1973); *United States v. Cranson*, 453 F.2d 123 (4th Cir. 1971), *cert. denied*, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); *United States v. Allison*, 414 F.2d 407 (9th Cir.), *cert. denied*, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); *Clemons v. United States*, 133 U.S.App.D.C. 27, 408 F.2d 1230 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969). An independent hearing on the admissibility of identification evidence, either before trial or at trial outside the presence of the jury, would remove the disadvantage to defendant's counsel of investigating the propriety of the identification evidence in the presence of the jury. In addition, it would protect the jury from being exposed to evidence that might subsequently be determined inadmissible. Kentucky state courts have apparently since endorsed this procedure. *See Brown v. Kentucky*, 564 S.W.2d 24 (Ct.App.1978). The issue in this case, however, is not whether a hearing outside the presence of the jury is the preferable procedure but whether such a procedure is constitutionally mandated.

In *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court held that a defendant's due process rights were violated by a procedure which allowed the same jury that determined the guilt or innocence of a defendant to determine simultaneously the issue of the voluntariness of the defendant's confession. The fundamental premise of *Jackson* was that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, *without regard for the truth or falsity of the confession*." *Jackson v. Denno, supra* at 376, 84 S.Ct. at 1780. (Emphasis added.) A jury that is considering the guilt or innocence of a defendant is likely to allow the truthfulness of a confession to influence its determination of the voluntariness of the confession. To avoid this danger, *Jackson* established the procedural requirement that, prior to the admission of a confession, the trial judge must make an independent determination of its voluntariness after an adequate hearing on the issue. "[T]he purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts." *Lego v. Twomey*, 404 U.S. 477, 486, 92 S.Ct. 619, 625, 30 L.Ed.2d 618 (1972). Its purpose is to protect the due process right against the introduction of involuntary confessions, regardless of their reliability.

[3] The basis of the due process right against suggestive identification procedures is significantly different.

It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377 at 384 [88 S.Ct. 967, 19 L.Ed.2d 1247]. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a de-

fendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Neil v. Biggers, 409 U.S. 188 at 198, 93 S.Ct. 375 at 381–382, 34 L.Ed.2d 401 (1972). Thus, whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

We construe *Pinto v. Pierce*, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967), as holding that due process does not require that the hearing upon which the trial judge makes his independent determination of voluntariness, as is required by *Jackson v. Denno, supra*, be held outside the presence of the jury.[1] The Supreme Court has never ruled on the precise question presented here. We conclude, however, that, by analogy to the ruling in *Pinto*, due process does not require a hearing outside the presence of the jury on the issue of the reliability of identification evidence. We recognize, as is pointed out in the dissent citing language in *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), that trial counsel for defendant does bear an extra burden in exploring the reliability of identification evidence in the presence of the jury. However, we note that the issue before us now was not the issue before the Court in *Wade*, and, further, *Pinto* was decided shortly after *Wade*. Moreover, it appears to us that the burden of exploring the voluntariness issue before the jury would be at least as great as the burden of exploring the reliability of identification evidence before the jury.

The decision of the Third Circuit in *United States v. Driber*, 546 F.2d 18 (1976), relied upon by the dissent, does hold that due process requires that the court hold the hearing to determine the admissibility of identification evidence out of the presence of the jury if the request for such a hearing is "not frivolous." (*Driber*, at 22). We note, however, that in many cases it would be difficult, if not impossible, to determine whether the request was frivolous without holding the hearing. Moreover, *Driber* relies on federal precedents which may well be examples of the exercise of supervisory powers rather than rulings on the requirements of due process.

We conclude, then, that as applied to identification evidence, *Jackson v. Denno, supra*, and *Pinto, supra*, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

[4] Having determined the initial procedural issue, we turn next to the substantive issue of whether the introduction of identification evidence in these cases violated due process standards. As we have previously indicated, reliability is the key factor in determining the admissibility of identification evidence. Among the factors relevant to reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers, supra*, 409 U.S. at 199, 93 S.Ct. at 382. These factors must be weighed against the effect of the suggestive procedure to determine whether the identifica-

1. We also recognize that the decision is placed on the alternative ground that trial counsel of defendant did not object to holding such hearing in the presence of the jury.

tion is so unreliable as to create a substantial likelihood of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

[5, 6] The identification evidence introduced at the trial of the petitioner, James Willard Summitt, consisted of both an in-court identification and a pretrial photographic identification. Under some circumstances, the use of a photographic display may enhance the possibility of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). But each case must be considered on its own facts. *United States v. Ayendes*, 541 F.2d 601 (6th Cir. 1976), *cert. denied*, 429 U.S. 1063, 97 S.Ct. 789, 50 L.Ed.2d 779 (1977). The pretrial photographic identification in this case cannot be characterized as either suggestive or unreliable. Ms. Furgason had ample opportunity to study her assailant. She provided the police with a detailed and accurate description. Soon after the attack, she identified Summit from among a multitude of police photographs that were presented in a neutral fashion. Under these circumstances, we cannot find that there was a substantial likelihood of misidentification. Since we find that introduction of the pretrial identification was not improper, we need not consider whether the in-court identification had an independent basis.

[7-9] At the trial of the petitioner, John Gregory Watkins, the prosecution introduced in-court identifications by the two witnesses to the robbery, Walter Smith and Donald Goeing. These identifications were based on a pretrial lineup and a pretrial showup. Since we believe that there was no independent source for the in-court identifications, the validity of their admissibility is dependent on the validity of the pretrial identification procedures.

A showup is inherently suggestive. When only one person is presented to a witness, there is a natural tendency for the witness to feel obligated to provide a positive identification. But in some cases, a showup becomes a necessary identification procedure. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Given the seriousness of the wounds to Donald Goeing, a showup was necessary in this case. That showup was conducted in a manner that did not take advantage or augment its inherent suggestiveness. Goeing had had a clear, albeit brief, opportunity to view the person robbing the liquor store.[2] At the showup, Goeing's identification of Watkins reflected an element of uncertainty, but that element was very small. Based on the totality of the circumstances, we cannot conclude that the identification at the showup was so unreliable as to create a substantial likelihood of misidentification.

[10, 11] Unlike a showup, a lineup need not be and should not be unduly suggestive. The lineup in this case, however, to some degree employed the key element of the witness' description, lightness of complexion, to set Watkins apart from the other two persons in the lineup. Watkins, according to the picture of the lineup, was of a somewhat lighter complexion than the other two persons in the lineup. Such an identification procedure probably could have been avoided. But, even so, unnecessary suggestiveness by itself does not require the exclusion of the identification as long as it contains sufficient indicia of reliability. *Neil v. Biggers, supra*, 409 U.S. at 198, 93 S.Ct. 375.

In addition to the suggestiveness of the lineup, there are several facts which indicate possible unreliability. Walter Smith admitted that at the time of the lineup he "wasn't completely sure" that Watkins was the robber. Moreover, Smith originally described the age of the robber as approximately thirty to thirty-five, whereas Watkins was significantly younger. These facts must be weighed against the facts which

2. The liquor store was well-lit. Goeing was in the process of filling a cooler with soft drinks. When he heard the words, "This is a holdup," he turned and looked at the robber. Goeing's movements evidently caused the robber to shoot him. Goeing lost consciousness about five seconds later as the robber fled from the store.

reflect reliability. Smith had a good opportunity to look at the person robbing the store.[3] While his identification at the lineup contained a degree of uncertainty perhaps greater than Goeing's identification at the showup, the degree of uncertainty was not substantial. That initial uncertainty did not continue. Moreover, Smith was not exposed to any additional suggestive procedures. *See Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

[12] The admissibility of the lineup identification presents a very close question. But based on the totality of the circumstances we believe that it was sufficiently reliable that there was no substantial likelihood of misidentification.

[13, 14] The issue with respect to each one of the identifications in these cases is limited to whether their introduction into evidence violated due process. A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders a trial unfair. As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given the identification. *Manson v. Brathwaite, supra*. Given the limited focus of our inquiry, we hold that the introduction of identification evidence in these trials did not violate due process.

[15, 16] Finally, we consider the petitioner Watkins' claim that the prosecutor's closing argument deprived him of a fair trial. There is little doubt that several of the prosecutor's remarks were improper.[4] But impropriety alone is not sufficient. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "The prosecutorial argument must be so egregious so as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979). That point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case. In this case, we are convinced that the prosecutor's remarks were not so pervasive nor so prejudicial as to deny the petitioner due process.

Each of the issues raised in these appeals involve alleged violations of due process. Our scope of review, therefore, is limited to whether the conduct complained of was contrary to basic notions of fairness. Applying this narrow standard of fairness, we conclude that the judgments of the district courts must be and are

AFFIRMED.

MERRITT, Circuit Judge, dissenting.

In each of these habeas corpus cases from Kentucky, there is a serious question concerning the reliability of the courtroom

3. Smith was standing at the cash register when three men walked in. One man approached him and asked him for cigarettes. When Smith turned back around, the man had pulled a gun and stated, "This is a holdup." Thus, Smith was face-to-face with the robber for the brief time that the robbery was in progress.

4. In his closing argument, the prosecutor stated:

> ". . . When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in
>
> . . . . . .
>
> The only way that we can have any effect on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community.
>
> . . . . This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them."

We have considered similar remarks concerning the defendant's character and the threat to the community to be beyond the bounds of propriety. *United States v. Barker*, 553 F.2d 1013 (6th Cir. 1977).

identification of the defendant as the perpetrator of the crime. In both, the identification testimony constitutes the only substantial evidence linking the defendant with the crime. In both, the state trial judge denied the request of defense counsel for a hearing on the question out of the presence of the jury. In such circumstances, I would follow Judge Aldisert's opinion for the Third Circuit in *United States v. Driber*, 546 F.2d 18 (1976), holding that due process requires a hearing out of the presence of the jury where serious identification questions are present. Otherwise, defense counsel is paralyzed in his efforts to defend his client. He is in the untenable position, as the Supreme Court noted in *United States v. Wade*, 388 U.S. 218, 241, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967), of trying by cross-examination of the identification witness "to discover and reveal unfairness, while bolstering the . . . courtroom identification by bringing out and dwelling upon his prior identification."

In re ESTATE of B. Joseph RATH, Deceased.

The DETROIT BANK AND TRUST COMPANY, Executor, and Catherine Rath, Surviving Wife, Plaintiffs-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

No. 77-1403.

United States Court of Appeals, Sixth Circuit.

Argued June 8, 1979.

Decided Oct. 19, 1979.

Beneficiary of life policy brought action to recover income taxes. The United States District Court for the Eastern District of Michigan, Philip Pratt, J., entered judgment in favor of taxpayer and government appealed. The Court of Appeals, Cecil, Senior Circuit Judge, held that, under the circumstances, the proceeds of the policy were ordinary income to the beneficiary to the extent that they exceeded the amount which she had paid to a corporation to purchase policy from it, together with the premiums which she had paid.

Reversed and remanded.

1. Internal Revenue ⇐410.1

In the absence of any action on the part of deceased insured whereby there was a transfer of insurance policy from the corporation to himself, under the terms of an option which he held, and a subsequent transfer from himself to his wife, even though the husband may have given the wife the money with which she made the purchase from the corporation, where the policy was transferred from the corporation to the insured, the amounts received under the policy following the insured's death were ordinary income to the wife to the extent that they exceeded the amount which she paid for the policy in the amount of premiums which she subsequently paid. 26 U.S.C.A. (I.R.C.1954) § 101.

2. Internal Revenue ⇐410.1

Fact that corporation placed a value of $11,600 on life policy at the time that it was conveyed to insured's wife, whereas the value of the policy for gift or estate tax purposes was $17,500, did not show that the transfer of the policy from the corporation to the wife was in part a sale by the corporation and in part a gift by the insured, who had directed that the policy be assigned to his wife. 26 U.S.C.A. (I.R.C.1954) § 101.

3. Internal Revenue ⇐410.1, 1202

Although private ruling and revenue ruling supported the view that deceased insured possessed incident of ownership in policy for estate tax purposes because of his right to purchase the policy from the corpo-

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 19 1979

JOHN P. HEHMAN, Clerk

No. 78-3587

JOHN GREGORY WATKINS,

Petitioner-Appellant,

v.

DONALD BORDENKIRCHER, WARDEN, KENTUCKY STATE PENITENTIARY,

Respondent-Appellee.

Before: LIVELY and MERRITT, Circuit Judges, and BROWN, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Issued as Mandate: November 19, 1979

COSTS: None

Filing fee.....$ .....
Printing $ .....

Total $ .....

A True Copy.

Attest:

Deputy Clerk

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT

C78-0241 L(A) WATKINS V. BORDENKIRCHER

DATE	NR.	PROCEEDINGS
6/28/67		Petition received and forwarded to Magistrate
6/29/78	1.	Order by Mag. Booth that Motion to proceed IFP granted, petition ordered fi Resp. shall file answer w/in 20 days. Notice
6/29/78	2.	Petition filed.
7/19/78	3.	Return to Show Cause Order, Response, Motion to Dismiss and in alternative m for s/j by respondent w/memo in support & exhibits. Order tend.
7/21/78	4.	TRAVERSE to response: RESPONSE to motion to dismiss and Motion for summary
8/7/78	5.	ORDER by Judge Allen that respondent file transcript of evidence No. SC-554- of Supreme Court of Ky. w/in 15 days from date of order. Notice.
8/ 78	6.	CERTIFIED COPY OF TRANSCRIPT OF EVIDENCE AND TRANSCRIPT OF RECORD by respondent by order of Court.
8/29/78	7.	MEMORANDUM OPINION by Judge Allen re:motion to dismiss or, in alternative, S NOTICE.to counsel.
8/29/78	8.	SUMMARY JUDGMENT by Judge Allen that motion of respondent sustained and comp dismissed w/prejudice. Final and appealable. Notice.
10/6/78	9.	NOTICE OF APPEAL filed by petitioner.
10/6/78	10.	REQUEST for Certificate of Probable Cause filed; Order tend.
10/23/78	11.	CERTIFICATE OF PROBABLE CAUSE by Judge Allen.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

JOHN GREGORY WATKINS, Petitioner,	)	
v.	)	CIVIL ACTION
DONALD BORDENKIRCHER, Warden Kentucky State Penitentiary, Respondent.	)	No. C 78-0241 L(A)

MEMORANDUM OPINION

This action is under submission on the motion of the respondent to dismiss or, in the alternative, for summary judgment. In considering the motion, the Court has had the benefit of the entire trial record in the Jefferson Circuit Court, as well as the decision of the Supreme Court of Kentucky, affirming petitioner's conviction on May 2, 1978, Watkins v. Commonwealth, Kentucky, ____ S.W.2d ____

The first issue raised by the petitioner relates to the questio of the methods of identification used by the prosecution. Petitione was charged with the attempted armed robbery of the Thoroughbred Liquor Store in Louisville, Kentucky, on January 11, 1975. The robbery occurred at about 11:30 p.m., when four men came to the store and one of them asked an employee of the store, Walter Smith, for a pack of cigarettes. When Smith turned to get the cigarettes, one of the men said "this is a hold-up". Following this announcement, Donald L. Goeing, a part-owner of the store, who was stocking a soft drink cooler, turned around and immediately thereafter two shots were fired by a person whom Goeing described as the petitioner, one of which hit Mr. Goeing's heart and the other his wrist and arm. Immediately thereafter the man who fired the shots ran out the door.

Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the

prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified b Goeing as the person who had fired the shots, and that this iden- tification was reinforced in Goeing's mind by having seen petitio several times while awaiting the call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a line-up two days after the robbery and there was shown three or four black males. He identified the petitioner at the line-up, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later said that af he got himself together, he knew that petitioner was the man. Lik Goeing, he had also seen petitioner several times after the line-u on the occasion of various court appearances.

Petitioner contends that the failure of the trial court to gr petitioner's motion for an in-camera hearing on the identification question deprived petitioner of a fair trial, in accordance with du process of law. Petitioner further contends that the failure to suppress the identification, after its unreliability was discovered at trial, denied Watkins a fair trial.

Petitioner has not cited, nor have we found, any cases which hold that there is a constitutional requirement that a suppression hearing be held prior to trial, and out of the presence of the jury on the question of identification. In Ray v. Commonwealth, Kentuck 550 S.W.2d 482, 483 (1977) and Watkins v. Commonwealth, Kentucky, supra, (1978), the Supreme Court of Kentucky has held that, although pretrial suppression hearings are preferable, the failure to hold them does not require the reversal of a conviction. We are, likewis convinced that, although pretrial identification hearings are much to be preferred over the method of presenting the entire identifica-

tion case to the jury without a pretrial hearing, the due process rights of the petitioner have not been violated, inasmuch as he had and exercised the opportunity to cross-examine thoroughly the witnesses on identification.

As to the second prong of petitioner's argument with respect to identification, the Court is convinced that Stovall v. Denno, 388 U.S. 293, 302 (1967) is authority for rejecting petitioner's claim as to the witness Goeing. Stovall, supra, holds that where a potential witness at a criminal trial is in serious physical condition, it is not improper for the police to take a suspect to the hospital for the purpose of asking the witness whether he can identify the suspect. In the case at bar, Goeing was seriously injured, and we do not believe that the petitioner's constitutional rights were violated by the confrontation at the hospital, although Goeing did testify that petitioner was not asked to utter any words, whereas, in Stovall, supra, petitioner was asked to repeat the words which were uttered at the hold-up.

With respect to the testimony of Smith as to his out-of-court identification, there is no showing of undue suggestiveness such as occurred in Foster v. California, 394 U.S. 440 (1969) where the California witness identified the defendant only after two line-ups.

In the case of Neil v. Biggers, 409 U.S. 188, 198 (1972), the Supreme Court stated that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification' (citing) Simmons v. United States, 390 U.S., at 384." In Neil v. Biggers, supra, at p. 199, the court set out the factors which are to be considered in evaluating the likelihood of misidentification, which "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation."

While applying these factors, we note that the crime occurred

in a well-lit store, that the witness Goeing's attention was of a very short duration but that he saw petitioner face-to-face and that Smith's attention was called by the announcement that there was a hold-up. We note that witness Smith, in his first description of the petitioner, believed him to be 30 to 35 years of age, whereas it developed that petitioner was only 17 years old. We note that Goeing was certain that the petitioner was the criminal at the time of confrontation, and that Smith, although not absolutely certain, became more so after the confrontation. We note also that the confrontations took place only two days after the crime.

Applying these factors, and the totality of the circumstances and rule referred to in Neil v. Biggers, supra, we are of the opinion that petitioner's due process rights were not violated by the identification procedures used.

The second argument made by petitioner relates to the closing statement of counsel for the Commonwealth. Over objections, he made the following remarks:

> Mr. Zollinger: ". . . I don't like to see anybody go to the penitentiary. The reason I don't like to see that is because they have to be there with people exactly like themselves. When they go to the penitentiary they are going to be in the same enclosure with people like themselves who haye no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in. He doesn't belong in the community where people go to work every day."
>
> Mr. Southard: "Your Honor, I'm going to object. I think this argument is out of the context of the evidence.
>
> The Court: "Overrule the objection.
>
> Mr. Southard: "Thank you.
>
> Mr. Zollinger: "He belongs in a community of people like himself, not out here where he's confronting people who work for a living. That don't go around packing guns, that aren't going into places where other people are working and pointing a gun at them and confronting them with death. That's strictly the conditions.
>
> "The only way that we can have any effect on the on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the

> Governor on down, that we don't want this man or men like him in our community. We want him out of here. And the only way you can get that message across is by fixing the sentences as long as you possibly can fix them. Fix those sentences so long that this man will be off the streets as long as we possibly can keep him off the streets." (Tr. 174-175).

> Mr. Zollinger: "And the kind of community that you will live in, that your children will live in, and your grandchildren will live in . . .I don't think you would prefer to have a community with people like this in it. This is your chance to get them out of here. This is your chance." (Tr. 176).

> Mr. Zollinger: ". . .don't think this is being harsh. This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them." (Tr. 178).

The Supreme Court has held in Donnelly v. DeChristoforo, 416 U.S. 637 (1974) that where a habeas corpus petitioner alleges a deprivation of his due process rights by the improper conduct of a prosecutor, such allegation grants to the federal courts only the narrow one of due process review, and not the broad exercise of supervisory power that (it) would possess in regard to (its) own trial court'." See 416 U.S. at 642.

The petitioner here relies, to some extent, upon Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974). In that case, the prosecutor referred to petitioner's alleged prior involvement in criminal acts not charged in the indictment and not probative of either scheme or intent, and also boasted that he knew his questions were objectionable but even if stricken the jury would not forget them. He also made a prejudicial statement before the jury when he realized he would not be able to make a closing argument because petitioner's counsel had waived closing argument. The court held that these facts, combined with a possible violation of petitioner's Fourth Amendment rights, entitled petitioner to a hearing in the district court on his writ for habeas corpus.

United States v. Leon, 534 F.2d 667 (6th Cir. 1976) was a case involving the supervisory powers of the Court of Appeals and not the narrow power of due process review involved in a habeas corpus action.

There the court held that it considers "the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused." See 534 F.2d at p. 679.

In the case at bar, if we applied the tests set out in United States v. Leon, supra, we would hold that the remarks complained of were irrelevant and that they did not communicate to the jury any false information. They were fairly extensive and, of course, deliberately placed before the jury. The strength of the proof as to the guilt of the accused depended largely upon the testimony of eye witnesses Smith and Goeing, which we have previously discussed.

We have compared the closing statement of the prosecutor with the closing statement he made in the case of Morris E. Whiteside v. Donald E, Bordenkircher, 435 F.Supp. 68 (W.D. Ky. 1977). There the prosecutor intimated that the life of the only eye witness to the crime might have been threatened because she might have taken "her life in her hands" and "her testimony 'took courage' and that it was a problem getting victims of armed robberies to come into court because they were 'terrorized'." There was nothing in the record to substantiate those statements, and, in addition, the prosecutor made many references to the rising crime in the community and the inability of the courts to cope with it. A complete description of his conduct is set out on pages 69, 70 and 71 of 435 F.Supp.

We find that there is a substantial difference between the language used by the prosecutor in the case at bar, and that the petitioner has not met his burden of showing that the remarks of the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process. We find particularly pertinent in this context the statement made by the Supreme Court in Donnelly v. DeChristoforo, supra, at p. 647, "(t)he result reached by the Court of Appeals in this case leaves virtually meaningless

the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in Miller (Miller v. Pate, 386 U.S. 1 (1967)) and Brady, supra, (Brady v. Maryland, 373 U.S. 83 (1963)) to amount to a denial of constitutional due process."

In evaluating the remarks of a prosecutor, the question of whether or not his conduct so infects the trial with unfairness as to make the resulting conviction the denial of due process is not always easy of resolution. This is the case here, since the prosecutor did make several rather emotional remarks about the alleged duties of the jury to cleanse the community of the criminal element who "go around packing guns". However, the evidence is ample that the defendant was, in fact, pointing a gun at the witnesses and, in fact, shot one of them, and since there is no reference made by the prosecutor which was misleading as to any significant fact, and no denial of any specific rights under any specific provision of the Bill of Rights, we hold that petitioner's writ for habeas corpus must be denied.

We note, in passing, that the prosecutor's erroneous remark concerning whether or not the petitioner and his friends were with a girl on the night of the crime was of little or no significance, and that no objection was made to the comment made by the prosecutor.

A summary judgment in accordance with this opinion as has day been entered.

Dated 9-28-78

Charles M. Allen
United States District Judge

cc: Counsel of Record

ENTERED
Sept 29, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

JOHN GREGORY WATKINS,
Petitioner,

v.

DONALD BORDENKIRCHER, Warden
Kentucky State Penitentiary,
Respondent.

CIVIL ACTION

No. C 78-0241 L(A)

SUMMARY JUDGMENT

This action, having been submitted to the Court on the motion of respondent, Donald Bordenkircher, for summary judgment, and the Court, being of the opinion that there are no genuine issues of material fact and that respondent is entitled as a matter of law to summary judgment, and the Court, having filed its memorandum opinion,

IT IS ORDERED AND ADJUDGED that the motion of the respondent for summary judgment be and it is hereby sustained, and the complaint of the plaintiff is dismissed with prejudice.

This is a final and appealable judgment and there is no just cause for delay.

Dated 9-28-78

Charles M. Allen
United States District Judge

cc: Counsel of Record

ENTERED
Sept. 28, 1978
CLERK
DEPUTY CLERK

John Gregory WATKINS, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

May 2, 1978.

Defendant was convicted before the Jefferson Circuit Court, George H. Kunzman, J., of robbery in the first degree and first-degree assault and he appealed. The Supreme Court, Clayton, J., held that: (1) failure to suppress identification testimony did not prejudice defendant; (2) trial court did not err in permitting prosecutor to amend indictment at close of case to change name of victim, and (3) use of defendant's previous statements for impeachment purposes was proper.

Affirmed.

1. Criminal Law ⇐1168(1)

Denial of defendant's pretrial motion for suppression hearing on identification testimony in prosecution for robbery and assault did not require reversal of conviction where testimony by victims failed to show any impermissible suggestiveness in identification of defendant which would have prejudiced defendant's right to fair trial.

2. Criminal Law ⇐170, 1167(4)

Amendment of indictment at close of prosecution's case to change name of victim of robbery did not prejudice defendant where defendant testified he had not been present at scene of crime; there was no violation of protection against double jeopardy and defendant was not denied a fair trial. RCr 6.16.

3. Witnesses ⇐380(2)

In prosecution for robbery and assault, trial court did not err in permitting prior statements made by defendant regarding his whereabouts on night of offense into evidence for purposes of impeachment.

John B. Southard, Jr., Asst. Public Defender, Terrence R. Fitzgerald, Deputy Public Defender, Louisville, for appellant.

Robert F. Stephens, Atty. Gen., Victor Fox, Asst. Atty. Gen., Frankfort, for appellee.

CLAYTON, Justice.

The appellant, John Gregory Watkins, was convicted of robbery in the first degree and first-degree assault and was sentenced to 20 years on each charge.

On January 11, 1975, an attempted robbery occurred at Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith and Donald L. Goeing, Sr., were working in the store when at approximately 11:30 p. m., three or four black males entered the store. Smith testified that one of them walked up to the counter and asked for a pack of cigarettes. When Smith turned around, the man said, "This is a holdup." Goeing was refilling the soda machine at this time and when the assailant saw some movement in that direction, he stated, "I said, don't reach for anything," and fired two shots at Goeing. One shot hit Goeing in the arm and the other went through the right ventricle of his heart. Goeing was hospitalized for 12 days and recovered after a 3½-month convalescence.

The evidence against the appellant was based on identifications made by Smith and Goeing. Defense counsel submitted a written pretrial motion for a suppression hearing on the identification testimony. Before any evidence was heard, this motion was reasserted in court, out of the presence of the jury, and was denied. Prior to testimony and identification by Smith and Goeing, defense counsel objected to not being allowed an in-camera hearing, since it forced him to explore the circumstances of the identification testimony in the presence of the jury, but was overruled. The defense repeatedly moved for a mistrial on this point and again was denied. The appellant was then taken to the hospital in the custody of two police officers and was identified by Goeing from his hospital bed.

[1] Appellant's first assignment of error is that the refusal of the trial court to conduct a suppression hearing to review the procedures by which the appellant was identified and the failure to suppress such identification testimony deprived him of a fair trial. This court stated in *Ray v. Commonwealth*, Ky., 550 S.W.2d 482, 483 (1977): "Although we are of the opinion that the holding of such a hearing prior to the introduction of this testimony would have been the preferred course to follow, we are not persuaded the failure to have done so requires reversal of appellant's conviction." We are persuaded that the identification evidence fails to raise any impermissible suggestiveness and the appellant was in no way prejudiced. We are further convinced that under the "totality of the circumstances" appellant received a fair trial.

[2] Appellant's next assignment of error is that the court erroneously permitted the prosecutor to amend the indictment at the close of the evidence and thereby exposed the appellant to double jeopardy and denied him a fair trial. At the close of the proof for the Commonwealth, the prosecutor moved to amend the indictment to charge the appellant with the robbery of Walter Smith instead of Donald Goeing. As stated by the appellant in his brief, the question is whether the amendment of the indictment violated the constitutional protection against double jeopardy and denied Watkins a fair trial. We see no prejudice in merely changing the names of the victims. The appellant testified that he was not even present at the scene of the crime. How could he have been prejudiced? RCr 6.16 permits the court to amend the indictment prior to the verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. *See also Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[3] The appellant's next assignment of error is that the admission into evidence of statements containing references to other offenses deprived the appellant of a fair trial. This court is, however, of the opinion that the trial court did not err in permitting appellant's previous statements into evidence for purposes of impeachment. See discussion in *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). In an oral statement made to the investigating officer on the night of the alleged offense, the appellant stated that he spent the entire night at his relatives' house. Subsequently he made a written statement saying that he was at a pool hall in the area of the Thoroughbred Liquor Store on the evening of the robbery attempt. The testimony relating to other offenses was activity unrelated to the appellant but was that of other individuals not on trial.

Appellant's final assignment of error is that the closing argument of the Commonwealth's Attorney deprived him of his right to a fair trial. We have studied the evidence relating to this argument and find it to be without merit and that the final argument of the Commonwealth's Attorney was within the bounds of propriety.

The judgment is affirmed.

All concur.

Elmer L. BLAIR, Movant,

v.

GENERAL ELECTRIC COMPANY and Workmen's Compensation Board of Kentucky, Respondent.

Supreme Court of Kentucky.

May 2, 1978.

In workmen's compensation case, claimant, a die setter, appealed from a judgment of the Jefferson Circuit Court, Common Pleas, First Division, Michael O. McDonald, J., which affirmed award of

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH

DIVISION NO. 16

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS

JUDGMENT

JOHN GREGORY WATKINS DEFENDANT

* * * * * * * * * * * * *

AT A COURT HELD JULY 15, 1977

This day, the defendant was brought into court by the Sheriff. Comes his attorney Mr. Southard, Public Defender. This case being called on the defendants written motion for a new tria herein, the court being advised, overrules said motion herein. Th case also being called on the defendants motion to withhold the rendition of judgment heretofore entered herein, the court having received a presentencing report and having considered same and further having provided the defendant with information contained therein, overrules said motion because the defendant is in need of Correctional treatment that can be provided most effectively by his committment to a Correctional Institution. The defendant w advised of his legal right to appeal this judgment and if he coul not afford counsel, the court would appoint him counsel and if indigent will be allowed to proceed in forma pauperis, the defend acknowledge receipt of said information contained herein. The defendant was asked if he had any legal cause to show why judgmen should not be pronounced against him; upon advise of counsel, none being shown, it is ordered and adjudged that the defendant being _____years of age, be taken by the Sheriff of Jefferson County to the jail of Jefferson County and from there by the Sheriff of said County and transferred to the custody of the Department of Corrections at such location as the Department sha designate and remain in their custody for a period of not more than twenty years as to each count to run concurrent. Comes the Defendant and files his written notice of appeal herein. Comes the defendant by counsel, and filed his written motion to proceed in forma pauperis, the court being advised, sustains said motion herein. Ordered that the defendant be and is remanded to jail.

NO. 156242

JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH
DIVISION NO. 16

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS

JUDGMENT

JOHN GREGORY WATKINS — DEFENDANT

* * * * * * * * * * * * *

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Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS,
Petitioner,

—v.—

DONALD E. BORDENKIRCHER, WARDEN,
Respondent;

and

JAMES WILLARD SUMMITT,
Petitioner,

—v.—

DONALD E. BORDENKIRCHER, WARDEN,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JANUARY 17, 1980
CERTIORARI GRANTED MARCH 17, 1980

INDEX

Page

RE: JOHN GREGORY WATKINS

Chronological List of Relevant Docket Entries 1

Motion Filed in Jefferson Circuit Court on June 13, 1977 for Hearing Outside Presence of Jury Regarding Admissibility of Identification Testimony 3

Police Report of January 11, 1975, Defense Exhibit No. 2.... 5

Excerpts from Transcript of Trial Conducted in Jefferson Circuit Court on June 20 and 21, 1977:

Motion for Hearing Out of Presence of Jury on Identification Testimony 6

Excerpts from Testimony of Walter G. Smith 7

Excerpts from Testimony of Donald Leo Goeing, Sr. 17

Excerpts from Testimony of Officer Dennis Ferriell 24

Motion for Mistrial Based on Admission of Identification Testimony Without Conducting a Hearing Out of the Presence of the Jury 29

Excerpts from Testimony of John Gregory Watkins 30

Judgment Entered by the Jefferson Circuit Court on July 15, 1977 33

Opinion of the Kentucky Supreme Court Rendered on May 2, 1978 35

Memorandum Opinion of the United States District Court for the Western District of Kentucky Rendered on September 28, 1978 38

Judgment Entered by the United States District Court for the Western District of Kentucky on September 28, 1978.. 46

Opinion of the United States Court of Appeals for the Sixth Circuit Rendered on October 19, 1979 47

Judgment Entered by the United States Court of Appeals for the Sixth Circuit on October 19, 1979 59

Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in forma pauperis and Granting Petition for Writ of Certiorari 123

RE: JAMES WILLARD SUMMITT

Chronological List of Relevant Docket Entries 2

Excerpts from Transcript of Trial Conducted in Jefferson Circuit Court on May 17 and 18, 1976:

Motion to Conduct Hearing Out of the Presence of the Jury on the Admissibility of Identification Testimony.. 60

Page

Excerpts from Testimony of Detective Rick Sanders.... 60

Excerpts from Testimony of Donna Furgason 71

Excerpts from Testimony of James Willard Summitt.... 98

Defense Objection to In-Court Display of Tattoos Worn by Defendant 99

In-Court Exhibition of Tattoos Worn by Defendant 100

Excerpts from Testimony of Detective Rick Sanders 100

Judgment Entered by the Jefferson Circuit Court on June 4, 1976 111

Opinion of the Supreme Court of Kentucky Rendered on April 22, 1977 112

Memorandum Opinion of the United States District Court for the Western District of Kentucky Rendered on May 31, 1978 117

Judgment Entered by the United States District Court for the Western District of Kentucky on May 31, 1978 121

Opinion of the United States Court of Appeals for the Sixth Circuit Rendered on October 19, 1979 47

Judgment Entered by the United States Court of Appeals for the Sixth Circuit on October 19, 1979 122

Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in forma pauperis and Granting Petition for Writ of Certiorari 124

JOHN GREGORY WATKINS

v.

DONALD E. BORDENKIRCHER

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 25, 1975—Petitioner John Gregory Watkins was indicted by the Jefferson County Grand Jury for first degree robbery and first degree assault committed on or about January 11, 1975.

June 13, 1977—Petitioner John Gregory Watkins filed a pretrial motion for a hearing to be conducted outside the presence of the jury regarding the admissibility of identification testimony.

June 20 and 21, 1977—Petitioner John Gregory Watkins was tried by a jury and convicted of first degree robbery and first degree assault.

July 15, 1977—Judgment was entered by the Jefferson Circuit Court and the Petitioner John Gregory Watkins was sentenced to concurrent sentences of twenty (20) years.

May 2, 1978—Supreme Court of Kentucky rendered its opinion and affirmed the petitioner's conviction.

September 28, 1978—United States District Court for the Western District of Kentucky entered summary judgment and rendered its opinion dismissing a petition for a writ of habeas corpus filed in behalf of John Gregory Watkins.

October 19, 1979—United States Court of Appeals for the Sixth Circuit entered judgment and affirmed the United States District Court's dismissal of the petition for a writ of habeas corpus.

JAMES WILLARD SUMMITT

v.

DONALD E. BORDENKIRCHER

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 19, 1974—Petitioner James Willard Summitt was indicted by the Jefferson County Grand Jury for rape committed on or about July 21, 1974.

May 17 and 18, 1976—Petitioner James Willard Summitt was tried by a jury and convicted of rape. Counsel for the petitioner made an oral, pretrial motion for a hearing out of the presence of the jury on the admissibility of identification testimony.

June 4, 1976—Judgment was entered by the Jefferson Circuit Court and the Petitioner James Willard Summitt was sentenced to life imprisonment.

April 22, 1977—Supreme Court of Kentucky rendered its opinion and affirmed the petitioner's conviction.

May 31, 1978—United States District Court for the Western District of Kentucky entered summary judgment and rendered its opinion dismissing a petition for a writ of habeas corpus filed in behalf of James Willard Summitt.

October 19, 1979—United States Court of Appeals for the Sixth Circuit entered judgment and affirmed the United States District Court's dismissal of the petition for a writ of habeas corpus.

JEFFERSON CIRCUIT COURT
SIXTEENTH DIVISION

No. 153965
158242

COMMONWEALTH OF KENTUCKY, PLAINTIFF

v.

JOHN GREGORY WATKINS, DEFENDANT

MOTION FOR HEARING OUTSIDE PRESENCE OF JURY REGARDING ADMISSIBILITY OF IDENTIFICATION TESTIMONY

Filed June 13, 1977

* * * *

Comes the defendant, by counsel, and in support of the above motion states as follows:

I.

Defendant's counsel has reason to believe that the process by which the defendant was identified as the suspect in this case was illegal and further that any in-court identification would be tainted by the illegal out-of-court identification and therefore inadmissible under the rationale of *United States* v. *Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926; *Gilbert* v. *California*, 388 U.S. 218, L.Ed.2d 1178, 87 S.Ct. 1951; and *Stovall* v. *Denno*, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967, interpreting the Sixth and Fourteenth Amendments of the United States Constitution.

II.

For the above reason, it is respectfully moved that the Court hold a hearing outside the presence of the jury to determine the admissibility of both the out-of-court identification and any in-court identification that

might be offered by the State by any witness in the trial of this case.

WHEREFORE, the defendant prays that this Court order a hearing out of the presence of the jury in advance of any testimony regarding the identification of the person who allegedly committed the crime out of which this case arises, and that said hearing be held prior to jury selection in said cause in order that it not needlessly idle a jury during trial.

/s/ John B. Southard, Jr.
JOHN B. SOUTHARD, JR.
Assistant District Defender
Office of the Jefferson District
Public Defender
100 Republic Building
Louisville, Kentucky 40202
584-1211

CERTIFICATE OF SERVICE (omitted in printing)

POLICE REPORT OF JANUARY 11, 1975,
DEFENSE EXHIBIT NO. 2

CRIMINAL ATTEMPT-ASSAULT 1ST DEGREE—

WANTED D5 B512 P1 00-0683
1-11-75 2331 HRS

731½ SOUTH HANCOCK STREET/

THOROUGHBRED LIQUORDS/ 1-11-75 2331 SAT

NO. 1—DONALD LEO GOEING SR. W/M/25
ADDRESS—4841 S. 4TH STREET
PHONE—363-5573

REPORTED BY VICTIM NO. 2—WALTER G. SMITH
B/M/43 ADD—850 W. WALNUT ST
PHONE—589-5050

THE ABOVE VICTIM NO. 2 REPORTS THREE COLORS MALES ENTRY THE STORE. NO. 1 COLOR MALE ORDER A PACK OF CIGARETTE, WHEN VICTIM RETURNED TO GIVE THE SUBJECT HIS CIGARETTE, THE COLOR MALE HAD A GUN AND SAID "HOLD IT RIGHT THERE". AT WHICH TIME HE TURN AND FIRED TWO SHOTS AT VICTIM NO. 1 STRIKING HIM IN THE CHEST AND THE LEFT WRIST. AT THIS TIME ALL THREE SUBJECTS RAN FROM THE ABOVE LOCATION.

VICTIM NO. 1 TAKEN TO GENERAL HOSP. IN CRITICAL CONDITION.
HOMICIDE NOTICY.

WANTED/ NO. 1 C/M/35 5/9" 175 PDS WEARING A DARK SLIP-OVER SHIRT. ARMED WITH A SNUGNOE REV. BLACK STEEL.

NO. 2 C/M/30-31 5/9"

NO. 3 C/M NO DESCRIPTION

REPORTED BY DET. J. JOHNSON 0828
M. CLIFFORD 0107
W. KESSINGER 1468
L. CLAIN 0117
A. EMBRY 0167
CAR 963 B963 P4 1-12-75 0105

1-12-75 BRYSON 0130 HRS

EXCERPTS FROM TRANSCRIPT OF TRIAL CONDUCTED IN JEFFERSON CIRCUIT COURT ON JUNE 20 and 21, 1977

Motion for Hearing Out of Presence of Jury on Identification Testimony

* * * *

[2] MR. SOUTHARD: Your Honor, I've made three motions, the first one dealt with, I asked for an out of court hearing on the identification testimony that will be heard by the jury. I based that upon the fact that the original description given of the accused by the witnesses is directly contrary to the description given now. He was described at the time of the incident as a 35 year old black male, five foot nine inches tall. That is not the description of this accused. It's the defense's assertion that the show-up in the hospital room with Mr. Goeing was suggestive, that actions and statements made by the police officers at the time suggested that the culprit was in hand and that this was the man. Additionally the line-up involving Mr. White we would suggest is too suggestive. I think that the testimony will show that both the line-up was unfair and actions just part of the line-up were unfair.

* * * *

[10] MR. SOUTHARD: Your Honor, I would only submit that this whole case would not revolve [11] around whether or not Mr. Goeing was shot or whether he was robbed, but the identity of the perpetrator, and I think the issue is serious, that there are serious questions involved and we have a right to an out of court hearing under Frances vs Commonwealth.

MR. ZOLLINGER: And I believe it's serious questions, too, that the jury should resolve.

THE COURT: Overruled.

MR. SOUTHARD: Thank you, Your Honor.

THE COURT: All right.

* * * *

Excerpts From Trial Testimony Of
Walter G. Smith

* * * *

[20] WALTER G. SMITH, called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Zollinger:

1 What is your name?
A Walter G. Smith.
2 Can you speak a little louder, Mr. Smith?
A Walter G. Smith.
3 Thank you. On January the 11th of 1975, where were you working?
A At the Thoroughbred Liquors.
4 And what hours did you work there that night?
[21] A From 6:00 to 12:00.
5 Will you tell the jury what occurred there around 11:30 P.M.?
A Well, there were three men—there was four men that came in the store and one of them came up to the counter and asked me for a pack of cigarettes. I turned to get the cigarettes and when I turned around he said, "This is a hold-up."
6 Now, just stop right there. Do you see the man who did that in the courtroom today?
A Yes, I do.
7 Will you tell the jury where that man is?
A He's sitting right over there.
MR. SOUTHARD: Your Honor, I'm going to object to this in court identification based upon a motion I previously made.
THE COURT: All right. Overrule the objection.
8 Can you tell a little more definitely, is it the man with the coat or is it the man with the shirt on?
A The man with the shirt on.
MR. ZOLLINGER: Let the record show that he indicated John Gregory Watkins.

* * * *

[24] MR. SOUTHARD: I'm going to have to explore testimony of the line-up and the show-up that I feel like I shouldn't have to do in front of the jury. And I just want to again make my objection for the record to not being allowed to have a hearing.

THE COURT: Overrule the objection. Go ahead and proceed.

MR. SOUTHARD: I would submit in having to bring out such testimony is grounds for a mistrial. Thank you, sir.

(End of proceedings at bench.)

18 Now, prior to the night of this incident you had never before seen any of the people that came in, is that correct?

A I can't say that I have.

19 To your knowledge you've never seen them?

A No.

* * * *

[30] 50 Okay. And then Mr. Goeing was in a cooler here?

A Right.

51 Was the cooler on the bar side or the wall side of the store?

A The cooler faces the—in other words, the cooler is right under the counter here. It faces the customer. You know, as you open the box you're facing the customer.

52 I understand. Where would he have been getting the warm drinks from?

A He had them on the floor. He already had them on the floor.

53 On the wall side?

A Well, on the wall side is your liquor lined up on the wall.

54 Okay. So, they would be on the floor here around the cooler?

A Right.

55 So, Mr. Goeing had his attention on [31] the cooler, am I correct?

A Yes.

56 And you were standing, I presume this is the cash register?

A Right. The cash register is right here.

57 Okay. And so when you turned to get the cigarettes you were not aware of the gun?

A No.

58 But when you turned back around you were aware of the gun?

A Yes, right.

59 I understand. Now, you can be seated. What happened after you turned back around?

A Well, when I turned and he had the gun on me Donny was making movement over there. Because I was going to give him whatever he wanted, but Donny was making movement over there and he said, "I said don't reach for anything. This is a hold-up." And that's when, you know, he just fired it just like that. He didn't give him a chance to do anything.

60 Donny, you mean Mr. Goeing?

A Yes.

61 He was still putting in drinks?

A Yes.

[32] 62 When you say movement, this was his movement?

A Yes.

63 In other words, reaching down to get a bottle of pop to put in the cooler?

A Right.

64 So, it was quick enough after that that he still didn't understand what was going on, Mr. Goeing did not?

A Well, he heard him, he heard him when he said this is a stick-up, you know. But it was so quick, it happened so quick that, you know, he didn't have a chance to do anything.

65 All right.

A Because he didn't give me a chance to get any money or anything out.

66 I understand. And there were two shots fired, is that correct?

A Yes.

67 And immediately upon the shots being fired what happened?

A They ran out the door.

68 They ran. Mr. Goeing slumped to the floor?

A Yes.

[33] 69 You yourself, what did you do?

A I called the police and then I called the other owner of the store.

70 Just prior though at the time that the people were running out what were you doing?

A When the people were running out?

71 Yes, sir.

A I can't really—I was really so upset, that's the first time anything like that has ever happened to me in my life.

72 It's quite frightening, isn't it?

A Yes, it is very frightening.

73 Now, when you, sir, turned around you said you saw the gun. Did you see the gun or the face?

A I saw the face and the gun.

74 Could you describe the gun for the jury?

A Well, the only thing I know it was a short—after I seen guns since then it was like a, maybe a 38, that's all I can say.

75 And almost upon seeing the gun shots were fired, is that correct?

A Yes.

76 You said there were other people [34] that came in with him?

A Yes.

77 Could you describe these other people?

A No, I can't because they were back by the door area and I can't.

78 That's about 20 feet away from you?

A Yes, he was standing right in front of me and I can't tell.

79 Was there anyone else in the store besides the—

A (Interrupting) No, there was not.

80 There was no regular customers or anybody?

A No.

81 Do you remember giving a description of what happened to the police at the time that they arrived?

A Well, other than I—it's been two and a half years ago, I remember telling them what at the time, what I thought he looked like.

82 Do you remember saying, sir, that he was a black male, 35 years old, approximately five foot nine inches tall?

A I don't remember saying 35, but I remember saying he was a black male, yes. And I [35] remember giving the complexion of his skin. And the shirt, he had on a light colored shirt, I remember that.

83 Do you remember describing any of the other people?

A Other than they were black, but of darker skin.

84 Now, you reported to the police, I believe, that there were two others?

A Yes, well, now there must have been—I don't know if there were anybody right at the door on the outside, but I know there were two others in the store, yes.

85 So there were two others or three others?

A There were two—there were two others—let's see, I think there were three other guys. I really couldn't be completely sure about that, because they were huddled back by the door.

86 You said that the assailant said, "This is a hold-up," or what did he say?

A I remember hearing, "This is a hold-up"

87 Do you remember telling the police officers at the time of their investigation that he said, "Hold it right there"?

[36] A I remember then that he said, "Don't reach for anything".

88 You did make a description that night though to the police officers as soon as they arrived, is that correct?

A The best I could, I was very upset.

89 Now, at the time you made your description did you describe the voice, the tone of the voice or any particular type of accent?

A I don't remember the voice, I don't remember saying about the voice.

90 Did you describe anything about the size or the shape of his head or the type of hair cut that he had?

A I remember saying that he had on light colored clothing and I don't know whether I said he had on a hat or not, I don't remember.

91 But you don't remember whether you described any particular features about the size or shape of his head, whether he had a beard or was clean shaven?

A I think I said he had a mustache at that time.

92 All right. Do you remember describing in any way the manner in which he walked or carried himself?

[31] A No.

93 Did he carry the gun in his right or left hand?

A I don't remember that exactly which hand it was in. And if I can remember correctly, remember now it was in his left hand. But I don't remember, all I remember is seeing the gun at my side, that's all I can remember.

94 Allright.

A Because he was standing close to the counter.

95 Do you remember the color of his eyes?

A I don't remember the color of his eyes, but I remember what his eyes looked like at that time.

96 In other words, you were looking at him in the eyes, is that what you're saying?

A I was looking at his face and the gun, yes, if you want to put it that way.

97 So you described the type of shirt, complexion color, the height, the weight—

A (Interrupting) I didn't say weight.

98 You didn't say weight?

A No.

99 And a black male?

A Yes.

[38] 100 Now, isn't it correct that you said at the time to the police officers it's a black male, 35 years of age?

A I don't really remember whether I said 35 or not. I don't remember.

101 Could that be approximately what you said, an age grouping?

A I might have said around 30, I don't remember exactly what I said about the age.

102 Do you remember at any time expressing to the investigating police officers your desire that the assailant be caught, apprehended?

A No, I don't remember saying that.

103 Okay. Did you feel that way at the time?

A Well, sure, yes.

104 That's a natural human reaction, isn't it?

A Yes, right.

105 Do you remember the officers that were there in particular, any of them?

A I remember the young officer that came in the door first. I don't know his name, but he's the one that immediately went over to Donny and, you know, tried to see what he could do for him.

[39] 106 How long were the officers there during their investigation?

A Well, I don't know how long they were there after I left, but they had a time getting him over the counter because they couldn't bring him out either end. They had to lift him over the counter.

107 Did you leave before he departed in the ambulance?

A No, I was still standing there while they were trying to get him out.

108 Could you describe for me or for the jury the appearance of the officer that first went over the counter?

A Yes, he was a short officer and he had, his hair is sort of reddish hair, and he was about four—about five foot. He was short, sort of short about five foot. And his hair was sort of reddish blonde or something like that, it was a reddish cast.

109 Is this basically the type of description that you gave of the assailant at the time?

A Gave to who?

110 Is this basically—the description that you gave of the officer, is this basically the same type of description, the same characteristics that

* * * *

[40] 111 No, no, I'm talking about did you—the type of characteristics you just described as far as the officers are concerned, are they basically the same type of characteristics you described as far as the assailant is concerned?

A I don't remember.

112 Can you describe any of the other officers with any type of particularity?

A No, I cannot, just the one that first came in the door.

113 Now, you've been to court before on this incident, have you not?

A Yes.

114 And Mr. Zollinger has been the prosecutor in all these cases?

A I think so. I know it's been like eight times we've been down here.

115 And each time you came down you saw this accused John Gregory Watkins?

A No, not every time.

116 Most times, is that correct?

A Yes.

[41] 117 Do you remember whether the officers told you anything about whether they would contact you in the future if anything broke in the case or if they discovered anything in the case?

A No.

118 Did they subsequently contact you?

A No, they did not.

119 After the robbery weren't you contacted by the police and asked to come down to the Police Station?

A Oh, for the line-up, yes.

120 Was it about two days later?

A Yes.

121 Okay. And did you go down to the Louisville Police Headquarters?

A Yes.

122 Were you asked to view a line-up?

A Yes.

123 Prior to seeing a line-up were you shown at any time any pictures of any individuals that may have been participants in the offense?

A No.

124 When you went to see the line-up you were expected to find the assailant in the group of people you were shown, is that correct?

[42] A Right.

125 Now, there were only three people in this line-up?

A I don't know if it was three or four, I can't remember exactly.

126 Wouldn't it be true to state that they did not look similar, they were not alike in their characteristics?

A Well, I can't really say. What I was looking for was the man that held up the whiskey store and that's what I was looking for.

127 All right. Wouldn't it be true though to say that one of the men in the line-up besides the accused was a shorter and darker complexion?

A I don't remember, he may have been.

128 And the other was a taller man of darker complexion?

A I don't remember.

129 They were both—both of the other men were black men, is that not correct?

A I don't remember that.

130 Whether they were black or white?

A I know that—no, they weren't white, I know that.

131 It is true that the accused was the [43] only light skinned black male in the line-up, is that not right?

A I don't remember whether he was the only light skinned or not. All I know is what I was looking for.

132 At that time did you have any trouble making an identification?

A Well, I remember at that particular time saying that I wasn't completely sure at that time. But later, you know, later after I got myself together I knew that I had made, you know, that he was the man.

133 What had the police officers told you about the man that they had arrested?

A What did they tell me?

134 Yes.

A They didn't tell me anything about him.

135 All right. When you picked out the accused in the line-up did the officers seem pleased?

A I didn't look at their reaction.

136 Now, sir, would it be correct to state that every time you subsequently seen the accused in court your identification has became more sure in your own mind, is that correct?

A I can't say that, that every time that [44] every time that I have seen him, because after I got myself together I knew that he was the man.

MR. SOUTHARD: Thank you, sir.

REDIRECT EXAMINATION

By Mr. Zollinger:

137 Just one question, Mr. Smith. Where is this liquor store located again?

A It's on Hancock between Finzer and Jacob on the east side of the street.

138 And that's in the City of Louisville?

A Yes.

139 Jefferson County?

A Right.

140 I'm going to ask you again is there any question in your mind as to the identity of the man that came in and put that gun on you in that store?

A No.

141 And would you say that it's John Gregory Watkins?

A Yes.

142 And you're absolutely sure of that?

A Yes.

MR. ZOLLINGER: That's all.

* * * *

Excerpts From Trial Testimony of
Donald Leo Goeing, Sr.

* * * *

[46] DONALD LEO GOEING, SR., called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Zollinger:

1 What is your name?

A Donald L. Goeing, Sr.

2 Donald M.—

A (Interrupting) L.

3 L.?

A L for Leo.

4 Goeing, Sr. Were you part owner of the liquor store known as the Thoroughbred Liquor Store?

A Yes, I was.

5 And that was at Hancock and Gray, is that correct?

A No, it's between Finzer and Jacob on Hancock Street.

6 And right next door to that is a pool room?

A Oh, about, about 90 feet north of it.

7 90 feet north is the pool room?

A On the corner of Finzer and Jacob.

8 That's Ponder's Pool Room?

[47] A Yes.

9 Now, you were in the store, I understand, on January the 11th, 1975?

A Yes, I was.

10 Around 11:30 P.M.?

A Yes, between—it was closer to quarter till twelve, twenty till twelve.

11 Will you tell the jury in your own words just exactly what happened that night?

A The defendant, he walked in the store and ordered a pack of cigarettes. Walter Smith and I were working behind the counter that night and he came up to Walter Smith and asked for a pack of cigarettes. I was stocking the soft drink cooler. The next thing I heard the defendant say, "This is a hold-up". And while I was turning around he—I guess I took him by surprise and he fired one shot and it went through my heart, right vertical of my heart. And he fired another shot and it hit my wrist and it went through my arm. And then after that he took off running out the door.

12 All right. Is there any question in your mind as to the identity of the man who did that?

A I'd know his face any place.

13 And would you indicate who that was, [48] Mr. Goeing?

A John Gregory Watkins.

14 That's the man sitting here?

A That's the man sitting right at the table there.

MR. ZOLLINGER: Let the record show that he indicated John Gregory Watkins.

15 Now, how long were you in the hospital?

A Twelve days.

16 And how long after that were you incapacitated?

A Three and a half months.

17 You say one shot went through your heart?

A Right ventricle.

18 And the other shot went through your arm?

A Yes.

MR. ZOLLINGER: That's all. You may ask.

[49] CROSS EXAMINATION

By Mr. Southard:

19 Sir, you were a partner in the liquor store business, is that right?

A Yes.

20 Were you working full time or part time there?

A Three nights a week.

21 Prior to this incident had you ever before seen the defendant in this case?

A No, sir.

22 Prior to this incident had you ever before seen any of the parties involved?

A That was the only boy that I saw, the two standing by the door I didn't see their face.

23 Never saw them?

A No.

24 Now, sir, if I understand the testimony correctly, you were filling the soft dring cooler?

A Yes.

25 Was that one of the Coca Cola that had the sliding top?

A Sliding door, right.

26 You were picking drinks off the floor and putting them in the cooler?

[50] A Yes.

27 Did you ever look up prior to the shots actually being fired?

A I was standing right face to face with him. The bullet came to my chest and went through my chest.

28 I understand. I'm talking about prior to that. Prior to the statement being made, "This was a hold-up", or whatever was said, was there anything to bring your attention away from the cooler, anything out of the ordinary?

A When he said, "This is a hold-up," when I turned around I took him by surprise and he fired two shots at me.

29 I understand. Okay. So you turned around when he said this was a hold-up?

A I was facing—well, I wasn't directly behind him. The soft drink cooler is on the side of the cash register.

30 Now, so the request for cigarettes did not draw your attention?

A No, it was just like any other customer coming in asking for a pack of cigarettes.

31 I understand. Was there any other regular customers in the store besides the young man [51] that came in?

A Just those two by the door.

32 Were these regular customers?

A I didn't see their faces. There's a candy counter on my right and that was blocking the view of the door.

33 And you heard the words hold-up and you made a move in the direction of Mr. Smith, is that correct?

A Of Watkins.

34 All right. And the first shot was fired, is that correct?

A Right.

35 Did you lose consciousness?

A I'd say about five seconds after that. I knew he hit me in a pretty good spot because I was losing air like a balloon. You let the balloon out and the air sucks right on it.

36 So, did you actually see the assailant run out the door or did you slump behind the counter?

A Yeah, he ran out the door.

37 Did you see him do that or is that something you heard happened later?

A Yes, he took off.

38 You fell to the floor?

[52] A Yeah.

39 Do you remember anything else that happened inside the store after you were shot?

A After I was shot?

40 Yes.

A And dropping down on the floor?

41 Yes.

A An officer came in.

42 They put you in an ambulance, is that correct?

A I blanked out right then. When the officer came in he said, "How many times you've been shot?" I told him and then after that I blanked out.

43 All right. Sir, did you remember what the officer looked like?

A No, my face was lying down on the floor.

44 Lying on your stomach?

A Yes.

45 It would be a normal human reaction, I'm sure, that you were very much afraid and scared by all of this, is that not correct?

A Yes.

46 Besides the physical injury?

A Yes.

[53] 47 It would be fair to say at that time you only got a glimpse of the defendant, is that correct?

A No.

48 Did you describe for the police at any time the type of clothing that the assailant was wearing?

A At the time of the shooting?

49 At any time, right afterwards?

A Yeah.

50 What did you describe?

A Light tan.

51 Did you describe his physical, the shape of his face or the type of hair cut that he had?

A No.

52 Did you describe his skin coloring?

A Yes.

53 What was that?

A Light.

54 Did you describe his age?

A Young.

55 What hand did he hold the gun in?

A Right.

56 You were in the hospital, I think you told Mr. Zollinger, twelve days, is that correct?

[54] A Right.

57 At the time this incident happened, at the time you were in the hospital, did the name John Gregory Watkins mean anything to you?

A No.

58 So, when you use the name now, so definitely it's the name you've acquired through all the court appearances?

A By the face and that, right.

59 Now, John Watkins was brought to you in the hospital, is that correct?

A Right.

60 Was he in handcuffs?

A I couldn't say yes or no about that.

61 He was in the custody of two police officers, is that correct?

A Yes, two. Mr. Ferriell and other police officers brought him up to the hospital.

62 Now, had they told you prior to coming into your room that they were coming in?

A Yes.

63 Before Watkins entered the room what did they tell you?

A They were going to let me see someone that I could identify.

[55] 64 That you could identify.

A Yes.

65 So, when they brought him in the room you thought you were going to see your assailant, is that correct?

A He said he was going to bring somebody in and he wanted to know if I could identify them or not.

66 And John Watkins was brought into the room, is that correct?

A Right.

67 Did you identify him?

A Yes.

68 At that time?

A Yes.

69 Did you not state at that time that you weren't quite sure at first?

A I said it could have been close enough that it could have been his twin brother, it could have been somebody else.

70 How many appearances have you made in court since this time, this time in the hospital?

A Nine or ten I guess, been a few.

71 And in almost every occasion you have seen John Watkins sitting in the situation he is now?

[56] A About three of them I guess. They didn't bring him over a couple of times.

72 Would it be fair to say that at the time you were lying in the hospital bed you expected the police to bring your assailant in and confront you?

A Well, the only thing he told me he was going to bring somebody in for me to identify. So I identified the boy and that's what it was.

73 Did the officer ask him to say anything?

A No.

74 What was the police officer's reaction after the confrontation at the hospital? Did they say anything to you?

A No.

75 Now, you have discussed this case of Mr. Watkins with Mr. Smith on several occasions since this, have you not?

A You mean Mr. Smith and myself?

76 Yes.

A Yes.

77 You have been to court and sat several times and waited and talked about this case?

A Yes.

[57] 78 You have discussed with him the identity of John Gregory Watkins as being your assailant, is that not correct?

A Yes.

MR. SOUTHARD: Thank you, sir.

MR. ZOLLINGER: That will be all. Thank you.

THE COURT: All right. Any further need of this witness, gentlemen?

MR. ZOLLINGER: I would like him to stay around.

THE COURT: All right. Sir, would you remain outside the courtroom and do not discuss your testimony with any other witness.

(Witness excused)

MR. SOUTHARD: Your Honor, may we approach the bench?

THE COURT: Yes.

WHEREUPON, counsel for the plaintiff and the defendant, and the official reporter, approached the bench where a conference was held in whispered tones out of the hearing of the jury.

[58] MR. SOUTHARD: Your Honor, prior to the testimony of these two witnesses I made an objection. And I would again renew my objection to having to bring out that testimony and move for a mistrial.

THE COURT: I'm going to overrule you.

* * * *

Excerpts From Trial Testimony of Officer Dennis Ferriell

* * * *

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[58] OFFICER DENNIS FERRIELL, called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Zollinger:

1 What is your name?

A Officer Dennis Ferriell of the Louisville Division of Police.

2 And how long have you been on the police force?

A Approximately seven and a half years now, sir.

3 On January the 11th of 1975 what was your assignment?

A I was Beat Officer assigned to the Fifth District Beat 502.

* * * *

[63] A After I had informed Mr. Watkins of his constitutional rights and made sure that he understood his rights, I asked him about his involvement of the hold-up at Thoroughbred Liquor Store. Mr. Watkins told me that he was not involved, that he had nothing to do with the hold-up up there, but that he had heard that the police were looking for him. I asked him why he thought they were looking for him and he said that was just the rumors on the street. I asked him—I questioned him about his whereabouts on January the 11th, 1975, at approximate-

* * * *

18 All right. Now, I want you to tell the jury the circumstances of your taking him up to the hospital. Why did you take him up to the hospital to see Mr. Goeing?

A Well, at that time there was some [64] question as to whether or not Mr. Goeing was going to survive the incident.

MR. SOUTHARD: Objection, Your Honor. I move that that testimony be stricken.

THE COURT: Overruled.

A There was no way practical at that time that we could put Mr. Watkins in a line-up for Mr. Goeing to view other than that. It had to be a one on one confrontation. We took him to the hospital. I informed Mr.—first I had to speak with the doctor and the doctor said it was all right for Mr. Goeing to see the gentleman. I informed him that we had a suspect and we would like for him to see the suspect. If he could identify the man let us know, and if it was not the man let us know.

19 Was he to let you know in the presence of the man?

A No, I instructed Mr. Goeing to wait until he had viewed the man and then we would take the man out of the room and then he would indicate to me whether or not this was the man that committed the robbery or not.

20 Is that the way it happened?

A Yes, sir, that's correct.

21 Did you take the man out of the room [65] and then returned to see Mr. Goeing?

A Yes, sir, I did.

22 What did Mr. Goeing say at that time?

A He told me that that was the man that had the gun that had shot him.

23 All right. Now, at some time you continued to have an interest in the case, did you not?

A Yes, sir, I did. There was implications that other people were involved and it was still under investigation.

24 Now, I'll ask you if you later talked to Mr. Watkins and the circumstances under which you talked to him?

A Yes, sir, I did. Two days after the arrest, he was arrested on the 13th of January, I received a call.

MR. SOUTHARD: Your Honor, I'm going to object again, Your Honor.

THE COURT: Overruled.

MR. SOUTHARD: To the admission of any statement.

THE COURT: Overrule the objection.

MR. SOUTHARD: Thank you, sir.

* * * *

[74] 46 You were present when both identifications were made by both Mr. Smith and Mr. Goeing?

A Yes, sir, I was.

47 Was pictures of different accused—or possible suspects shown to Mr. Smith before he viewed the line-up?

A No, sir.

48 There were three people in the line-up, is that not correct?

A Yes, sir.

49 Both of the other two were dark skinned black males, is that not correct?

A I would say one was a little darker, one was medium. I think there are photographs available.

50 The accused is a very light skinned negro male, is he not?

[75] A Yes, sir—not very light, if I may, if you could understand it, it's like everyone else. Some people if they are light complected they are out in the sunlight more they are apt to be just a shade darker. When they are inside more they look lighter like anyone else, like myself, you, even though the man might be a black man.

51 I see. You're talking about sunburn, is that what you're talking about?

A Well, not exactly, but to some degree.

52 We're talking about January, though, aren't we?

A Yes, sir.

53 The young man sitting to my left is a light skinned black male, is that correct?

A I would say he was, yes, sir.

54 Do you have your files, sir?

A I believe they are on the table.

55 You took photographs of that line-up?

A I believe Detective Embry, C.I.S., actually took those.

56 These involve Mr. Smith, is that correct, Mr. Walter Smith?

A Yes, sir.

MR. SOUTHARD: Would you mark this [76] Defense Exhibit No. 1?

(Said photograph marked Defense Exhibit No. 1 for purposes of identification.)

57 Is this the picture of the line-up as it happened on the day that you testified to?

A Yes, sir, it is.

58 And does this accurately reflect the persons of the three participants?

A Yes, sir.

MR. SOUTHARD: Your Honor, I would offer this into evidence, Defense Exhibit No. 1.

THE COURT: All right.

(Defense Exhibit No. 1 entered into evidence and filed herewith.)

59 Now, when you went to the hospital, am I correct, that Mr. Watkins was the only person present besides the two police officers?

A With the exception of the medical staff.

60 The normal medical staff of the hospital?

A Yes, sir. Yes, sir.

61 Now, he was taken back to the Police Department and he was incarcerated in the City Jail for three days, two or three days?

[77] A Yes, sir.

62 And then you took the second—he called you over and gave you the second statement, is that correct?

A Yes, sir, he did.

63 Did you re-advise him of his rights?

A Yes, sir.

64 And he made this statement to you?

A Yes, sir.

65 Sir, are you familiar with the word squawk?

A Yes, sir.

66 What does that mean?

A We refer to it as our reports. The squawk is a field report that you take when an offense is committed. It's just a slang term for it.

67 A squawk, say if there was a hold-up at Citizens Fidelity Bank and an officer went over there the squawk subsequently put out would reflect what he saw and observed at the time?

A Yes, sir.

68 Are you familiar with the squawk that was issued on the Thoroughbred Liquor Store?

A Yes, sir, I have a copy of it.

69 Did you see it that morning when you [78] first reported for duty, you said after, just after it happened?

A Yes, sir, I was aware of it that afternoon when I reported for duty. I saw a copy of the squawk.

MR. SOUTHARD: Will you mark this Defense Exhibit No. 2?

(Said squawk marked Defense Exhibit No. 2 for purposes of identification.)

70 I will show you what I marked as Defense Exhibit No. 2 for identification—

MR. ZOLLINGER: (Interrupting) Judge, we will object to that being introduced, Your Honor.

THE COURT: On what basis?

MR. ZOLLINGER: On the basis that there is no evidence that he acted on that squawk, or that he ever saw it, or that it had any material relationship to his investigation.

MR. SOUTHARD: Your Honor, he testified that he saw it that morning.

THE COURT: Well, go ahead and ask a few more questions and make for sure that that's the squawk relating to this particular crime.

71 Can you identify that document, sir?

A Yes, sir, that's the copy of the field [79] report relating to the incident of the Thoroughbred Liquor Store.

72 And is this the report that you read the morning that you reported for duty?

A Yes, sir, I saw it that afternoon.

73 This is the copy of that report. This is not the original report, it's a copy?

A Yes, sir, right.

THE COURT: Okay.

MR. SOUTHARD: Your Honor, I would ask that it be admitted and be given to the jury.

THE COURT: Okay, that's all right.

(Defense Exhibit No. 2 entered into evidence and exhibited to the jury and filed herewith.)

MR. SOUTHARD: Thank you, Officer Ferriell.

THE COURT: Anything further from this Officer?

MR. ZOLLINGER: No, Your Honor.

(Witness excused)

* * * *

Motion for Mistrial Based on Admission of Identification Testimony Without Conducting A Hearing Out of The Presence of the Jury

* * * * *

[93] MR. SOUTHARD: I would renew my motion to dismiss Count 2, in that I believe, number one, that the assault is part and parcel of the robbery, same facts

and circumstances and it's multiplicious and should be dismissed. I believe that if you don't believe that, that if you believe the robbery was on Mr. Smith, then the indictment has failed to charge the crime that Mr. Zollinger has proved and a directed verdict of acquittal should be granted on the robbery charge. I would move to dismiss the robbery charge on a directed verdict of acquittal based upon the statement I just made, or in the alternative dismiss the assault charge based on my previous motion to dismiss. I would also move for a mistrial based on the admission of the identity testimony without allowing an out of court hearing as to that testimony, especially since he was not represented at the line-up by counsel after the arrest.

* * * *

[98] MR. SOUTHARD: Your Honor, I have made previously a motion for a directed verdict on the robbery and also renewed my motion to dismiss the assault in the alternative, and I made a motion for a mistrial based upon the admission of the identification testimony, which has not been ruled on yet.

THE COURT: All right. So, I'm going to overrule you on that.

* * * *

Excerpts From Trial Testimony of John Gregory Watkins

* * * *

[121] JOHN GREGORY WATKINS, called as a witness by counsel for the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Southard:

1 Would you state your full name, please?
A John Gregory Watkins.
2 You're the accused in this case?
A Correct.
3 John, how old are you?
A Twenty.

4 How old were you on January the 11th, 1975?
[122] A Seventeen.
5 John, do you go to school?
A Yes.
6 What do you study?
A English, social studies and mathematics.
7 You're working for your GED certificate?
A Yes.
8 John, do you remember where you were on January the 11th, 1975?
A Yes.
9 Do you remember where you were on January the 11th, 1974?
A No.
10 Why do you remember January the 11th, 1975?
A Because January the 11th, 1975, I was accused of a robbery that I didn't commit.
11 You say you were accused, were you subsequently arrested?
A Yes.
12 Were you arrested by the officer sitting over here on the opposite side of Mr. Zollinger?
A Yes.
[12] 13 At the time you were arrested did you make any type of statement to the officer when he picked you up?
A Yes.
14 What did you tell him?
A I told him where I was at the time that the robbery was supposed to have occurred.
15 And what did you say?
A I told him that I was at 13th and Lee with two associates, David English and Gerald Redman, shooting pool.
16 David English is your cousin, is that correct?

* * * *

A Correct.
17 And Gerald Redman is your friend?
A Right.

18 Where did you spend the night that night?

A Over at David English's house.

19 Did Officer Ferriell take you to the hospital?

A Yes.

20 What did you see at the hospital?

A I seen a man laying in a hospital bed, a white man, and he was sick.

[124] 21 How could you tell he was sick?

A He had tubes running in his nose.

22 And do you know who that man was?

A (Witness shook his head in the negative.)

23 Do you know who that man is today?

A Yes, Goeing.

24 Mr. Goeing, the man who testified with the mustache?

A Right.

25 Had you ever seen him prior to going into the hospital with Officer Ferriell?

A No.

26 After going to the hospital did Officer Ferriell bring you back and put you in the City Jail?

A Yes.

Judgment Entered by Jefferson Circuit Court
July 15, 1977

JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH
DIVISION NO. 16

No. 153965

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

JOHN GREGORY WATKINS, DEFENDANT

JUDGMENT

AT A COURT HELD JULY 15, 1977

This day, the defendant was brought into court by the Sheriff. Comes his attorney Mr. Southard, Public Defender. This case being called on the defendants written motion for a new trial herein, the court being advised, overrules said motion herein. This case also being called on the defendant's motion to withhold the rendition of judgment heretofore entered herein, the court having received a presentencing report and having considered same and further having provided the defendant with information contained therein, overrules said motion because the defendant is in need of Correctional treatment that can be provided most effectively by his commitment to a Correctional Institution. The defendant was advised of his legal right to appeal this judgment and if he could not afford counsel, the court would appoint him counsel and if indigent will be allowed to proceed in forma pauperis, the defendant acknowledge receipt of said information contained herein. The defendant was

asked if he had any legal cause to show why judgment should not be pronounced against him; upon advise of counsel, none being shown, it is ordered and adjudged that the defendant being — years of age, be taken by the Sheriff of Jefferson County to the jail of Jefferson County and from there by the Sheriff of said County and transferred to the custody of the Department of Corrections at such location as the Department shall designate and remain in their custody for a period of not more than twenty years as to each count to run concurrent. Comes the Defendant and files his written notice of appeal herein. Comes the defendant by counsel, and filed his written motion to proceed in forma pauperis, the court being advised, sustains said motion herein. Ordered that the defendant be and is remanded to jail.

/s/ George H. Kunzman
Judge

Opinion Rendered by Supreme Court of Kentucky on May 2, 1978

Watkins v. *Commonwealth, Ky., 565 S.W.2d 630 (1978)*

RENDERED: May 2, 1978

SUPREME COURT OF KENTUCKY

SC-554-MR

JOHN GREGORY WATKINS, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEORGE H. KUNZMAN, JUDGE
INDICTMENTS NOS. 153965 & 158242

OPINION OF THE COURT BY JUSTICE CLAYTON
AFFIRMING

The appellant, John Gregory Watkins, was convicted of robbery in the first degree and first-degree assault and was sentenced to 20 years on each charge.

On January 11, 1975, an attempted robbery occurred at Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith and Donald L. Goeing, Sr., were working in the store when at approximately 11:30 p.m., three or four black males entered the store. Smith testified that one of them walked up to the counter and asked for a pack of cigarettes. When Smith turned around, the man said, "This is a holdup." Goeing was refilling the soda machine at this time and when the assailant saw some movement in that direction, he stated, "I said, don't reach for anything," and fired two shots at Goeing. One shot hit Goeing in the arm and the other went through the right ventricle of his heart. Goeing was hospitalized for 12 days and recovered after a 3½-month convalescence.

The evidence against the appellant was based on identifications made by Smith and Goeing. Defense counsel

submitted a written pretrial motion for a suppression hearing on the identification testimony. Before any evidence was heard, this motion was reasserted in court, out of the presence of the jury, and was denied. Prior to testimony and identification by Smith and Goeing, defense counsel objected to not being allowed an in-camera hearing, since it forced him to explore the circumstances of the identification testimony in the presence of the jury, but was overruled. The defense repeatedly moved for a mistrial on this point and again was denied. The appellant was then taken to the hospital in the custody of two police officers and was identified by Goeing from his hospital bed.

Appellant's first assignment of error is that the refusal of the trial court to conduct a suppression hearing to review the procedures by which the appellant was identified and the failure to suppress such identification testimony deprived him of a fair trial. This court stated in *Ray* v. *Commonwealth*, Ky., 550 S.W.2d 482, 483 (1977): "Although we are of the opinion that the holding of such a hearing prior to the introduction of this testimony would have been the preferred course to follow, we are not persuaded the failure to have done so requires reversal of appellant's conviction." We are persuaded that the identification evidence fails to rasie any impermissible suggestiveness and the appellant was in no way prejudiced. We are further convinced that under the "totality of the circumstances" appellant received a fair trial.

Appellant's next assignment of error is that the court erroneously permitted the prosecutor to amend the indictment at the close of the evidence and thereby exposed the appellant to double jeopardy and denied him a fair trial. At the close of the proof for the Commonwealth, the prosecutor moved to amend the indictment to charge the appellant with the robbery of Walter Smith instead of Donald Goeing. As stated by the appellant in his brief, the question is whether the amendment of the indictment violated the constitutional protection against double jeopardy and denied Watkins a fair trial. We see no prejudice in merely changing the names of

the victims. The appellant testified that he was not even present at the scene of the crime. How could he have been prejudiced? RCr 6.16 permits the court to amend the indictment prior to the verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. *See also Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The appellant's next assignment of error is that the admission into evidence of statements containing references to other offenses deprived the appellant of a fair trial. This court is, however, of the opinion that the trial court did not err in permitting appellant's previous statements into evidence for purposes of impeachment. See discussion in *Jett* v. *Commonwealth, Ky.*, 536 S.W.2d 788 (1969). In an oral statement made to the investigating officer on the night of the alleged offense, the appellant stated that he spent the entire night at his relative's house. Subsequently he made a written statement saying that he was at a pool hall in the area of the Thoroughbred Liquor Store on the evening of the robbery attempt. The testimony relating to other offenses was actively unrelated to the appellant but was that of other individuals not on trial.

Appellant's final assignment of error is that the closing argument of the Commonwealth's Attorney deprived him of his right to a fair trial. We have studied the evidence relating to this argument and find it to be without merit and that the final argument of the Commonwealth's Attorney was within the bounds of propriety.

The judgment is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

JOHN B. SOUTHARD, JR.
Assistant Public Defender

TERRENCE R. FITZGERALD
Deputy Public Defender
Office of the Jefferson
Public Defender
1000 Republic Building
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

ROBERT F. STEPHENS
Attorney General

VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Opinion of The United States District Court for The Western District of Kentucky Rendered on September 28, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 78-0241 L(A)

JOHN GREGORY WATKINS, PETITIONER

v.

DONALD BORDENKIRCHER, Warden
Kentucky State Penitentiary, RESPONDENT

MEMORANDUM OPINION

This action is under submission on the motion of the respondent to dismiss or, in the alternative, for summary judgment. In considering the motion, the Court has had the benefit of the entire trial record in the Jefferson Circuit Court, as well as the decision of the Supreme Court of Kentucky, affirming petitioner's conviction on May 2, 1978, *Watkins* v. *Commonwealth, Kentucky*, —— S.W.2d ——.

The first issue raised by the petitioner relates to the question of the methods of identification used by the prosecution. Petitioner was charged with the attempted armed robbery of the Thoroughbred Liquor Store in Louisville, Kentucky, on January 11, 1975. The robbery occurred at about 11:30 p.m., when four men came to the store and one of them asked an employee of the store, Walter Smith, for a pack of cigarettes. When Smith turned to get the cigarettes, one of the men said "this is a hold-up". Following this announcement, Donald L. Goeing, a part-owner of the store, who was stocking

a soft drink cooler, turned around and immediately thereafter two shots were fired by a person whom Goeing described as the petitioner, one of which hit Mr. Goeing's heart and the other his wrist and arm. Immediately thereafter the man who fired the shots ran out the door.

Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified by Goeing as the person who had fired the shots, and that this idenification was reinforced in Goeing's mind by having seen petitioner several times while awaiting the call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a line-up two days after the robbery and there was shown three or four black males. He identified the petitioner at the line-up, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later said that after he got himself together, he knew that petitioner was the man. Like Goeing, he had also seen petitioner several times after the line-up on the occasion of various court appearances.

Petitioner contends that the failure of the trial court to grant petitioner's motion for an in-camera hearing on the identification question deprived petitioner of a fair trial, in accordance with due process of law. Petitioner further contends that the failure to suppress the identification, after its unreliability was discovered at trial, denied Watkins a fair trial.

Petitioner has not cited, nor have we found, any cases which hold that there is a constitutional requirement that a suppression hearing be held prior to trial, and out of the presence of the jury, on the question of identification. In *Ray* v. *Commonwealth, Kentucky,* 550 S.W.2d 482, 483 (1977) and *Watkins* v. *Commonwealth, Kentucky, supra,* (1978), the Supreme Court of Ken-

tucky has held that, although pretrial suppression hearings are preferable, the failure to hold them does not require the reversal of a conviction. We are, likewise convinced that, although pretrial identification hearings are much to be preferred over the method of presenting the entire identification case to the jury without a pretrial hearing, the due process rights of the petitioner have not been violated, inasmuch as he had and exercised the opportunity to cross-examine thoroughly the witnesses on identification.

As to the second prong of petitioner's argument with respect to identification, the Court is convinced that *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967) is authority for rejecting petitioner's claim as to the witness Goeing. *Stovall, supra*, holds that where a potential witness at a criminal trial is in serious physical condition, it is not improper for the police to take a suspect to the hospital for the purpose of asking the witness whether he can identify the suspect. In the case at bar, Goeing was seriously injured, and we do not believe that the petitioner's constitutional rights were violated by the confrontation at the hospital, although Goeing did testify that petitioner was not asked to utter any words, whereas, in *Stovall, supra*, petitioner was asked to repeat the words which were uttered at the hold-up.

With respect to the testimony of Smith as to his out-of-court identification, there is no showing of undue suggestiveness such as occurred in *Foster* v. *California*, 394 U.S. 440 (1969) where the California witness identified the defendant only after two line-ups.

In the case of *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972), the Supreme Court stated that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification' (citing) *Simmons* v. *United States*, 390 U.S., at 384." In *Neil* v. *Biggers, supra*, at p. 199, the court set out the factors which are to be considered in evaluating the likelihood of misidentification, which "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demon-

strated by the witness at the confrontation, and the length of time between the crime and the confrontation."

While applying these factors, we note that the crime occurred in a well-lit store, that the witness Goeing's attention was of a very short duration but that he saw petitioner face-to-face and that Smith's attention was called by the announcement that there was a hold-up. We note that witness Smith, in his first description of the petitioner, believed him to be 30 to 35 years of age, whereas it developed that petitioner was only 17 years old. We note that Goeing was certain that the petitioner was the criminal at the time of confrontation, and that Smith, although not absolutely certain, became more so after the confrontation. We note also that the confrontations took place only two days after the crime.

Applying these factors, and the totality of the circumstances and rule referred to in *Neil* v. *Biggers*, *supra*, we are of the opinion that petitioner's due process rights were not violated by the identification procedures used.

The second argument made by petitioner relates to the closing statement of counsel for the Commonwealth. Over objections, he made the following remarks:

> Mr. Zollinger: ". . . I don't like to see anybody go to the penitentiary. The reason I don't like to see that is because they have to be there with people exactly like themselves. When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that way from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in. He doesn't belong in the community where people go to work every day.
>
> Mr. Southard: "Your Honor, I'm going to object. I think this argument is out of the context of the evidence.
>
> The Court: "Overrule the objection.
>
> Mr. Southard: "Thank you.

Mr. Zollinger: "He belongs in a community of people like himself, not out here where he's confronting people who work for a living. That don't go around packing guns, that aren't going into places where other people are working and pointing a gun at them and confronting them with death. That's strictly the conditions.

"The only way that we can have any effect on the on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community. We want him out of here. And the only way you can get that message across is by fixing the sentences as long as you possibly can fix them. Fix those sentences so long that this man will be off the streets as long as we possibly can keep him off the streets." (Tr. 174-175).

Mr. Zollinger: "And the kind of community that you will live in, that your children will live in, and your grandchildren will live in . . . I don't think you would prefer to have a community with people like this in it. This is your chance to get them out of here. This is your chance." (Tr. 176).

Mr. Zollinger: ". . . don't think this is being harsh. This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them." (Tr. 178).

The Supreme Court has held in *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974) that where a habeas corpus petitioner alleges a deprivation of his due process rights by the improper conduct of a prosecutor, such allegation grants to the federal courts only the narrow one of due process review, and not the broad exercise of supervisory

power that (it) would possess in regard to (its) own trial court'." See 416 U.S. at 642.

The petitioner here relies, to some extent, upon *Manning* v. *Jarnigan*, 501 F.2d 408 (6th Cir. 1974). In that case, the prosecutor referred to petitioner's alleged prior involvement in criminal acts not charged in the indictment and not probative of either scheme or intent, and also boasted that he knew his questions were objectionable but even if stricken the jury would not forget them. He also made a prejudicial statement before the jury when he realized he would not be able to make a closing argument because petitioner's counsel had waived closing argument. The court held that these facts, combined with a possible violation of petitioner's fourth Amendment rights, entitled petitioner to a hearing in the district court on his writ for habeas corpus.

United States v. *Leon*, 534 F.2d 667 (6th Cir. 1976) was a case involving the supervisory powers of the Court of Appeals and not the narrow power of due process review involved in a habeas corpus action. There the court held that it considers "the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused." See 534 F.2d at p. 679.

In the case at bar, if we applied the tests set out in *United States* v. *Leon*, *supra*, we would hold that the remarks complained of were irrelevant and that they did not communicate to the jury any false information. They were fairly extensive and, of course, deliberately placed before the jury. The strength of the proof as to guilt of the accused depended largely upon the testimony of eye witnesses Smith and Goeing, which we have previously discussed.

We have compared the closing statement of the prosecutor with the closing statement he made in the case of *Morris E. Whiteside* v. *Donald E. Bordenkircher*, 435 F.Supp. 68 (W.D. Ky. 1977). There the prosecutor intimated that the life of the only eye witness to the crime

might have been threatened because she might have taken "her life in her hands" and "her testimony 'took courage' and that it was a problem getting victims of armed robberies to come into court because they were 'terrorized'." There was nothing in the record to substantiate those statements, and, in addition, the prosecutor made many references to the rising crime in the community and the inability of the courts to cope with it. A complete description of his conduct is set out on pages 69, 70 and 71 of 435 F.Supp.

We find that there is a substantial difference between the language used by the prosecutor in the case at bar, and that the petitioner has not met his burden of showing that the remarks of the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process. We find particularly pertinent in this context the statement made by the Supreme Court in *Donnelley* v. *DeChristoforo*, *supra*, at p. 647, "(t)he result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in *Miller* (*Miller* v. *Pate*, 386 U.S. 1 (1967)) and *Brady*, *supra*, (*Brady* v. *Maryland*, 373 U.S. 83 (1963)) to amount to a denial of constitutional due process."

In evaluating the remarks of a prosecutor, the question of whether or not his conduct so infects the trial with unfairness as to make the resulting conviction the denial of due process is not always easy of resolution. This is the case here, since the prosecutor did make several rather emotional remarks about the alleged duties of the jury to cleanse the community of the criminal element who "go around packing guns". However, the evidence is ample that the defendant was, in fact, pointing a gun at the witnesses and, in fact, shot one of them, and since there is no reference made by the prosecutor which was misleading as to any significant fact, and no denial of any specific rights under any specific provision of the Bill of Rights, we hold that petitioner's writ for habeas corpus must be denied.

We note, in passing, that the prosecutor's erroneous remark concerning whether or not the petitioner and his friends were with a girl on the night of the crime was of little or no significance, and that no objection was made to the comment made by the prosecutor.

A summary judgment in accordance with this opinion as has this day been entered.

Dated 9-28-78

/s/ Charles M. Allen
CHARLES M. ALLEN
United States District Judge

cc: Counsel of Record

Judgment of The United States District Court for The Western District of Kentucky Entered on September 28, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 78-0241 L(A)

JOHN GREGORY WATKINS, PETITIONER

v.

DONALD BORDENKIRCHER, Warden,
Kentucky State Penitentiary, RESPONDENT

SUMMARY JUDGMENT

This action, having been submitted to the Court on the motion of respondent, Donald Bordenkircher, for summary judgment, and the Court, being of the opinion that there are no genuine issues of material fact and that respondent is entitled as a matter of law to summary judgment, and the Court, having filed its memorandum opinion,

IT IS ORDERED AND ADJUDGED that the motion of the respondent for summary judgment be and it is hereby sustained, and the complaint of the plaintiff is dismissed with prejudice.

This is a final and appealable judgment and there is no just cause for delay.

Dated 9/28/78

/s/ Charles M. Allen
CHARLES M. ALLEN
United States District Judge

cc: Counsel of Record

Opinion Rendered by United States Court of Appeals For the Sixth Circuit on October 19, 1979

Summit and Watkins v. *Bordenkircher, 608 F.2d 247 (6th Cir. 1979)*

No. 78-3415
No. 78-3587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(No. 78-3415)

JAMES WILLARD SUMMIT, PETITIONER-APPELLANT

v.

DONALD E. BORDENKIRCHER, WARDEN,
KENTUCKY STATE PENITENTIARY, RESPONDENT-APPELLEE

and

(No. 78-3587)

JOHN GREGORY WATKINS, PETITIONER-APPELLANT

v.

DONALD E. BORDENKIRCHER, WARDEN,
KENTUCKY STATE PENITENTIARY, RESPONDENT-APPELLEE

Appeals from the United States District Court
for the Western District of Kentucky

Decided and Filed October 19, 1979

Before: LIVELY and MERRITT, Circuit Judges, and BROWN,* District Judge.

BROWN, Chief District Judge, delivered the opinion of the Court in which LIVELY, Circuit Judge, joined. MERRITT, Circuit Judge, (p. 12) filed a separate dissenting opinion.

BROWN, J. These two appeals were consolidated for the purpose of considering whether it is a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence. We conclude that such a hearing is not constitutionally required and that the introduction of identification evidence in these cases did not violate due process standards. Accordingly, we affirm the decisions of the district courts.

The petitioner, James Willard Summit, was indicted for rape on September 19, 1974. The rape occurred in Jefferson County, Kentucky late in the evening of July 20, 1974 when two men forced the victim, Donna Jean Furgason, into their car. The incident took place over a period of approximately forty-five minutes.

On July 21, 1974, Ms. Furgason reported the rape to the police. She described her assailant as a white male in his thirties, approximately five feet nine inches, 180 pounds, with tattoos on both arms. She looked through approximately twelve volumes of photographs at the county police headquarters in an attempt to identify the person who had raped her. Two days later, she was taken to the city police headquarters to review additional volumes of photographs. At that time, she identified a photograph of James Willard Summitt.

Prior to trial, Summitt moved to suppress any in-court identification by Ms. Furgason and requested a hearing out of the presence of the jury to determine the admissibility of the identification evidence. That motion and request were denied.

At trial, both the pretrial photographic identification and an in-court identification were introduced. At the

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* Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

conclusion of the evidence, the jury returned a verdict of guilty and recommended life imprisonment. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

The petitioner, John Gregory Watkins, was indicted in March, 1975 for armed robbery and assault. The robbery took place at a liquor store in Louisville, Kentucky. During the course of the robbery, an employee in the store was shot in the wrist and in the heart.

Donald Goeing, the employee who was shot, described the robber as a young, black man with a light complexion. Walter Smith, the other employee in the store, described the robber as a black man with a light complexion, thirty to thirty-five years old, and approximately five feet, nine inches tall.

Two days after the robbery, Walter Smith viewed a lineup consisting of three black men, one of whom was the petitioner Watkins. Watkins had a lighter complexion than either of the other two men in the lineup, though none of them had a particularly dark complexion. Smith identified Watkins but admitted that he was not "completely sure" that Watkins was the person who robbed the store.

On the same day, Watkins was taken to the hospital room where Donald Goeing was recovering from his wounds. Goeing identified Watkins, but at the same time he stated that "it could have been close enough that it could have been his twin brother, it could have been somebody else."

Prior to his trial, Watkins filed a motion seeking a pre-trial hearing on the admissibility of the identification evidence. The trial judge denied the motion.

At the trial, the prosecution relied on the in-court identification of Watkins by both Smith and Goeing. On cross-examination, the circumstances surrounding both the lineup and the showup were brought out. Moreover, both Smith and Goeing admitted having seen Watkins in the courtroom on several occasions prior to trial. At the conclusion of the prosecutor's proof, the trial court denied Watkins' motion for a mistrial based on the introduction of the identification evidence. The jury returned a verdict

of guilty and recommended the maximum sentence. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

In both of these cases, the central dispute at trial was over the identification of the person who committed the crime. In every criminal trial, there exists some danger of misidentification. That inherent danger, however, is significantly increased whenever the identification is tainted by unnecessary and unduly suggestive procedures. To deter the use of suggestive identification procedures, the Supreme Court has held that a defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings. *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967). *See also Moore* v. *Illinois*, 434 U.S. 220 (1977); *United States* v. *Ash*, 413 U.S. 300 (1973); *Kirby* v. *Illinois*, 406 U.S. 682 (1972). Even where the right to counsel is not applicable, however, "due process protects the accused against the introduction of evidence of, or tained by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore* v. *Illinois*, *supra* at 227. It is this later due process protection which the petitioners claim was violated in their state trials.

The initial issue presented by these appeals is whether the admissibility of identification evidence must be determined at a hearing outside the presence of a jury. We have no doubt that such a procedure is the preferable one. See *Nassar* v. *Vinzant*, 519 F.2d 798 (1st Cir.), *cert. denied*, 423 U.S. 898 (1975). *See also United States* v. *Poe*, 462 F.2d 195 (5th Cir. 1972), *cert. denied*, 414 U.S. 845 (1973); *United States* v. *Cranson*, 453 F.2d 123 (4th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972); United *States* v. *Allison*, 414 F.2d 407 (9th Cir.), *cert. denied*, 396 U.S. 968 (1969); *Clemons* v. *United States*, 408 F.2d 1230 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964 (1969). An independent hearing on the admissibility of identification evidence, either before trial or at trial outside the presence of the jury, would remove the dissadvantage to defendant's counsel of investigating the propriety of

the identification evidence in the presence of the jury. In addition, it would protect the jury from being exposed to evidence that might subsequently be determined inadmissible. Kentucky state courts have apparently since endorsed this procedure. *See Brown* v. *Kentucky*, 564 S.W.2d 24 (Ct.App. 1978). The issue in this case, however, is not whether a hearing outside the presence of the jury is the preferable procedure but whether such a procedure is constitutionally mandated.

In *Jackson* v. *Denno*, 378 U.S. 368 (1964), the Supreme Court held that a defendant's due process rights were violated by a procedure which allowed the same jury that determined the guilt or innocence of a defendant to determine simultaneously the issue of the voluntariness of the defendant's confession. The fundamental premise of *Jackson* was that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, *without regard for the truth or falsity of the confession.*" *Jackson* v. *Denno*, *supra* at 376. (Emphasis added.) A jury that is considering the guilt or innocence of a defendant is likely to allow the truthfulness of a confession to influence its determination of the voluntariness of the confession. To avoid this danger, *Jackson* established the procedural requirement that, prior to the admission of a confession, the trial judge must make an independent determination of its voluntariness after an adequate hearing on the issue. "[T]he purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts." *Lego* v. *Twomey*, 404 U.S. 477, 487 (1972). Its purpose is to protect the due process right against the introduction of involuntary confessions, regardless of their reliability.

The basis of the due process right against suggestive identification procedures is significantly different.

> It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court iden-

> tification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Neil v. *Biggers*, 409 U.S. 188 at 198 (1972). Thus, whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

We construe *Pinto* v. *Pierce*, 389 U.S. 31 (1967), as holding that due process does not require that the hearing upon which the trial judge makes his independent determination of voluntariness, as is required by *Jackson* v. *Denno*, *supra*, be held outside the presence of the jury.[1] The Supreme Court has never ruled on the precise question presented here. We conclude, however, that, by analogy to the ruling in *Pinto*, due process does not require a hearing outside the presence of the jury on the issue of the reliability of identification evidence. We recognize, as is pointed out in the dissent citing language in *United States* v. *Wade*, 388 U.S. 218, 240 (1967), that trial counsel for defendant does bear an extra burden in exploring the reliability of identification evidence in the presence of the jury. However, we note that the issue before us now was not the issue before the Court in *Wade*, and, further, *Pinto* was decided shortly after *Wade*. Moreover, it appears to us that the burden of exploring the voluntariness issue before the jury would be at least as great as the burden of exploring the reliability of identification evidence before the jury.

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[1] We also recognize that the decision is placed on the alternative ground that trial counsel of defendant did not object to holding such hearing in the presence of the jury.

The decision of the Third Circuit in *United States* v. *Driber*, 546 F.2d 18 (1976), relied upon by the dissent, does hold that due process requires that the court hold the hearing to determine the admissibility of identification evidence out of the presence of the jury if the request for such a hearing is "not frivolous." (*Driber*, at 22). We note, however, that in many cases it would be difficult, if not impossible, to determine whether the request was frivolous without holding the hearing. Moreover, *Driber* relies on federal precedents which may well be examples of the exercise of supervisory powers rather than rulings on the requirements of due process.

We conclude, then, that as applied to identification evidence, *Jackson* v. *Denno*, *supra*, and *Pinto*, *supra*, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

Having determined the initial procedural issue, we turn next to the substantive issue of whether the introduction of identification evidence in these cases violated due process standards. As we have previously indicated, reliability is the key factor in determining the admissibility of identification evidence. Among the factors relevant to reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil* v. *Biggers*, *supra* at 199. These factors must be weighed against the effect of the suggestive procedure to determine whether the identification is so unreliable as

to create a substantial likelihood of misidentification. *See Manson* v. *Brathwaite*, 432 U.S. 98 (1977).

The identification evidence introduced at the trial of the petitioner, James Willard Summitt, consisted of both an in-court identification and a pretrial photographic identification. Under some circumstances, the use of a photographic display may enhance the possibility of misidentification. *Simmons* v. *United States*, 390 U.S. 377 (1968). But each case must be considered on its own facts. *United States* v. *Ayendes*, 541 F.2d 601 (6th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). The pretrial photographic identification in this case cannot be characterized as either suggestive or unreliable. Ms. Fergason had ample opportunity to study her assailant. She provided the police with a detailed and accurate description. Soon after the attack, she identified Summit from among a multitude of police photographs that were presented in a neutral fashion. Under these circumstances, we cannot find that there was a substantial likelihood of misidentification. Since we find that introduction of the pretrial identification was not improper, we need not consider whether the in-court identification had an independent basis.

At the trial of the petitioner, John Gregory Watkins, the prosecution introduced in-court identifications by the two witnesses to the robbery, Walter Smith and Donald Goeing. These identifications were based on a pretrial lineup and a pretrial showup. Since we believe that there was no independent source for the in-court identifications, the validity of their admissibility is dependent on the validity of the pretrial identification procedures.

A showup is inherently suggestive. When only one person is presented to a witness, there is a natural tendency for the witness to feel obliged to provide a positive identification. But in some cases, a showup becomes a necessary identification procedure. *Stovall* v. *Denno*, 388 U.S. 293 (1967). Given the seriousness of the wounds to Donald Goeing, a showup was necessary in this case. That showup was conducted in a manner that did not take advantage or augment its inherent suggestiveness. Goeing had had a clear, albeit brief, opportunity to view the

person robbing the liquor store.[2] At the showup, Goeing's identification of Watkins reflected an element of uncertainty, but that element was very small. Based on the totality of the circumstances, we cannot conclude that the identification at the showup was so unreliable as to create a substantial likelihood of misidentification.

Unlike a showup, a lineup need not be and should not be unduly suggestive. The lineup in this case, however, to some degree employed the key element of the witness' description, lightness of complexion, to set Watkins apart from the other two persons in the lineup. Watkins, according to the picture of the lineup, was of a somewhat lighter complexion than the other two persons in the lineup. Such an identification procedure probably could have been avoided. But, even so, unnecessary suggestiveness by itself does not require the exclusion of the identification as long as it contains sufficient indicia of reliability. *Neil* v. *Biggers*, *supra* at 198.

In addition to the suggestiveness of the lineup, there are several facts which indicate possible unreliability. Walter Smith admitted that at the time of the lineup he "wasn't completely sure" that Watkins was the robber. Moreover, Smith originally described the age of the robber as approximately thirty to thirty-five, whereas Watkins was significantly younger. These facts must be weighed against the facts which reflect reliability. Smith had a good opportunity to look at the person robbing the store.[3] While his identification at the lineup contained a degree of uncertainty perhaps greater than Goeing's identification at the showup, the degree of uncertainty was not substantial. That initial uncertainty did not continue.

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[2] The liquor store was well-lit. Goeing was in the process of filling a cooler with soft drinks. When he heard the words, "This is a holdup," he turned and looked at the robber. Goeing's movements evidently caused the robber to shoot him. Goeing lost consciousness about five seconds later as the robber fled from the store.

[3] Smith was standing at the cash register when three men walked in. One man approached him and asked him for cigarettes. When Smith turned back around, the man had pulled a gun and stated, "This is a holdup." Thus, Smith was face-to-face with the robber for the brief time that the robbery was in progress.

Moreover, Smith was not exposed to any additional suggestive procedures. See *Foster* v. *California*, 394 U.S. 440 (1969).

The admissibility of the lineup identification presents a very close question. But based on the totality of the circumstances we believe that it was sufficiently reliable that there was no substantial likelihood of misidentification.

The issue with respect to each one of the identifications in these cases is limited to whether their introduction into evidence violated due process. A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders a trial unfair. As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given the identification. *Manson* v. *Brathwaite*, *supra*. Given the limited focus of our inquiry, we hold that the introduction of identification evidence in these trials did not violate due process.

Finally, we consider the petitioner Watkins' claim that the prosecutor's closing argument deprived him of a fair trial. There is little doubt that several of the prosecutor's remarks were improper.[4] But impropriety alone is not

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[4] In his closing argument, the prosecutor stated:

". . . When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in

. . . .

The only way that we can have any effect on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community.

. . . This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or

sufficient. *Donnelly* v. *DeChristoforo*, 416 U.S. 636 (1974). "The prosecutorial argument must be so egregious so as to render the entire trial fundamentally unfair." *Cook* v. *Bordenkircher*, 602 F.2d 117 (6th Cir. 1979). That point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case. In this case, we are convinced that the prosecutor's remarks were not so pervasive nor so prejudicial as to deny the petitioner due process.

Each of the issues raised in these appeals involve alleged violations of due process. Our scope of review, therefore, is limited to whether the conduct complained of was contrary to basic notions of fairness. Applying this narrow standard of fairness, we conclude that the judgments of the district courts must be and are

AFFIRMED.

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have any respect for other people. The only way you can get them to behave is to get tough with them."

We have considered similar remarks concerning the defendant's character and the threat to the community to be beyond the bounds of propriety. *United States* v. *Barker*, 553 F.2d 1013 (6th Cir. 1977).

MERRITT, Circuit Judge, dissenting. In each of these habeas corpus cases from Kentucky, there is a serious question concerning the reliability of the courtroom identification of the defendant as the perpetrator of the crime. In both, the identification testimony constitutes the only substantial evidence linking the defendant with the crime. In both, the state trial judge denied the request of defense counsel for a hearing on the question out of the presence of the jury. In such circumstances, I would follow Judge Aldisert's opinion for the Third Circuit in *United States* v. *Driber*, 546 F.2d 18 (1976), holding that due process requires a hearing out of the presence of the jury where serious identification questions are present. Otherwise, defense counsel is paralyzed in his efforts to defend his client. He is in the untenable position, as the Supreme Court noted in *United States* v. *Wade*, 388 U.S. 218, 241 (1967), of trying by cross-examination of the identification witness "to discover and reveal unfairness, while bolstering the . . . courtroom identification by bringing out and dwelling upon his prior identification."

Judgment of The United States Court of Appeals for The Sixth Circuit Entered on October 19, 1979

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-3587

JOHN GREGORY WATKINS, PETITIONER-APPELLANT

v.

DONALD BORDENKIRCHER, WARDEN,
KENTUCKY STATE PENITENTIARY, RESPONDENT-APPELLEE

Before: LIVELY and MERRITT, Circuit Judges, and BROWN, District Judge.

JUDGMENT—Filed Oct. 19, 1979

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ Illegible
Clerk

EXCERPTS FROM TRANSCRIPT OF TRIAL CONDUCTED IN JEFFERSON CIRCUIT COURT ON May 17 and 18, 1976

Motion to Conduct Hearing Out of Presence of Jury On The Admissibility of Identification Testimony

* * * *

[36] MR. ZEMAN: I'd like to make a motion, Judge, based on the out-of-court identification to suppress any in-court identification under Wade, Stovall and Denno. As I understand it apparently the identification was from a picture of the defendant in possession [37] of the County Police. And I think that that would be unduly suggestive to base an in-court identification on that out-of-court I.D.

THE COURT: We have had cases on that before. It's not, really.

MR. ZEMAN: But if the Court would, I would like to know if the Court would entertain a hearing at least as far as the witnesses are concerned as to that out-of-court identification?

THE COURT: Well, off the record a minute.

(At this point there was an off record discussion.)

MR. ZEMAN: We are moving to suppress any in-court identification with the County Police from the mug shot that she would have seen two days after the alleged incident.

THE COURT: Okay, that's overruled.

End of proceedings in chambers.

Excerpts From Trial Testimony of Detective Rick Sanders

* * * *

[48] A Detective Rick Sanders.

2 Where are you employed, Detective Sanders?

A Jefferson County Police Department.

3 And how long have you been employed there?

A Four and a half years.

4 Did you have occasion, Detective Sanders to investigate the allegations contained in this indictment?

A Yes, sir, I did.

5 Will you tell us in your own words as best you remember what you did and what your investigation revealed?

A Yes, sir. On July 21, 1974, at approximately 11:30 P.M., in the evening, I was contacted in my office. I was working Homicide at that time. I was contacted by Louisville Detective Swencki who works City Homicide, Louisville Police. He was in General Hospital at the time.

MR. ZEMAN: Objection to whatever someone else did or where someone else was. I think that that is hearsay.

MR. STREPEY: Judge, it's not verbatim conversation—

THE COURT: (Interrupting) Overrule [49] the objection. Go ahead.

A Detective Swencki was at General Hospital. And he called me asking if I could come to General to interview a rape victim. I advised him that I could. I left the office and went to General Hospital where I met Donna Furgason, the victim.

Donna had gone to the Louisville Police Headquarters thinking that that was the person—

MR. ZEMAN: (Interrupting) Object to what someone else thought. Of course, the prosecuting witness, he doesn't know what she thinks.

THE COURT: I will sustain the objection.

A We found that the offense happened in Jefferson County, our jurisdiction rather than Louisville police. So I then took the investigation and Detective Swencki then stopped his investigation. The reason for her going to General Hospital was that every time we have a sex offense case, or a rape victim, we take them to General Hospital where they are cared for, and seen by a gynecologist, to determine whether there are any trauma or injuries to the victim. At the time I got to General Hospital she was receiving treatment from a doctor there.

After the investigation ceased at General Hospital, after she had had her examination, I took her to County Police Headquarters to our Homicide Office, [50] where I took a statement from her, where she told me what had happened. She said the rape—

MR. ZEMAN: (Interrupting) Objection. Can we see the statement, please, if you are reading from some notes?

MR. STREPEY: Let him introduce it first. He hasn't —she will be available for, of course, examination herself.

THE COURT: She is going to testify. Overrule the objection.

MR. ZEMAN: Judge, at this time I'd like to make the same objection as to any testimony based on the Cooke versus Commonwealth case, which would be hearsay as happening in the course of some days after the event.

THE COURT: Overruled.

MR. STREPEY: There's been no testimony yet.

THE COURT: Overruled. Go ahead.

A After talking with Mrs. Furgason I learned that the offense had happened on that date, earlier in the morning in the A.M. hours, 1:30 A.M. I asked her why the delay, why she waited to call the police. She was very emotionally upset, crying, stated she had fear of her life or her family's life. She stated that after [51] the incident happened she was threatened by the defendant and he told her if she went to the police, or said anything about this, that he would come back and harm her and her family.

I learned that it happened in the Fairdale area, which is in Jefferson County. It happened off Penile Road, which is one-half mile off of Manslick Road in Fairdale.

After I took the statement from Donna she explained to me fully what had happened. She was extremely upset. I took her down to the second floor to our Criminal Investigation Division, where I showed her numerous photographs.

6 Did she give you personally a description of her assailant?

A Yes, sir. She said one subject—

MR. ZEMAN: (Interrupting) Objection continuing on the basis of the Cooke case.

THE COURT: Overruled.

A I took the information from her so I could fill out the original report. And the two subjects that we were looking for, the driver of the automobile was just an accessory to the thing, he wasn't guilty of rape.

MR. ZEMAN: Objection as to someone's [52] guilt or innocence.

THE COURT: Sustained.

A The subject that had done the rape was supposed to have been a white male, in his 30's, approximately five foot nine, 180 to 190 pounds, had a rough complexion and had tattoos on both arms. She said that she heard him—she knew that he went by the name of Jimbo, that was his nickname, and that she had learned this during this offense.

9 Now, did she view some photographs there?

A Yes, sir, she looked through numerous photographs, all of our photographs at Jefferson County Police Headquarters, and advised me, she said, "The guy's picture is not in here, I cannot identify anybody out of these mug shots."

10 How many pictures did she look at, do you have any idea?

A Hundreds.

11 All right.

A It was late at night. After my investigation, the initial investigation, it was some 2:00 A.M. the next morning. Due to her condition I told her and her stepfather to go home and to call me the next couple of days, so they could come and get me, and I'd take them to Louisville Police Headquarters where she [53] could look through more photographs.

On the 23rd of July she came to County Police Headquarters where she met me. I took her to Louisville Police Headquarters to the second floor, the Criminal Investigation Division, where she looked through all their photographs also trying to locate the subject that raped her. She went through several of these photographs, and

after a short time she pointed to the defendant's picture and said, "This is the man that raped me. There's no doubt about it, this is Jimbo, the man that raped me." I then learned that the defendant was James Willard Summitt, got his adress off of the photograph, looked through our files, through the City's files, and then tried to locate the subject so I could place him under arrest or for a line-up.

Myself and my partner, Detective Horine, looked for the subject for several days, went to his probation officer, and tried to determine where we could find him. We didn't have any luck, he was hard to locate. We learned he was transient.

At that time I contacted the victim again and asked her if she would come down and take a warrant out for the subject because I thought he might be out of our jurisdiction. We had information he was in Indiana. This is the reason we asked her to take the [54] warrant, because if he was in Indiana we would need a warrant.

12 Do you recall the time delay between when you advised her to take the warrant and the offense was first reported?

A The offense was first reported on July 21, 1974, at 2300 hours, or at 11:00 P.M., and she took the warrant on the 21st of the same night in the evening hours after we had called her and told her we could not locate the subject, we had information he might be in Indiana.

13 And at what time, if you know of your own knowledge, did the offense occur according to her information?

A The offense happened approximately 1:00 A.M., on the 21st.

14 So what time was there then between the offense and when it was first brought to your attention?

A Maybe 14 hours of so.

15 All right.

A The reason, she had gone to the police earlier than that, but she had gone to the wrong department. She went to the City department in the evening hours, maybe four or five A.M., and they, thinking it was a City offense, they started the investigation.

* * * *

[65] 76 Did she give you a description of the car?

A '67 to '69 white Chevrolet with black interior, hardtop.

77 You just read from this. It doesn't have a color on it, does it?

A That paper doesn't, no, sir.

78 No. And this is some notes you typed up after the incident?

A Yes, sir.

79 Okay.

A But she told me at that time it was a '67 to '69 white Chevrolet with black interior, hardtop.

80 Now, did this young man give you any further description of the car, as to the contents of the car, anything unusual?

A She said it was not an automatic, it was a three speed on the column, black interior. But the defendant was not driving the car, he was a passenger in the car.

81 Okay. And approximately how long did she say she was in this car?

A Approximately two hours, hour and a half.

82 Did she tell you a direct time?

[66] A No, sir, she did not.

83 She didn't?

A She told me she was picked up at approximately 1:00 A.M., in the morning and she did not tell me any other time.

84 Picked up?

A Right.

85 You used the term picked up?

A Picked up by the defendant and forced into the automobile by the defendant.

86 Well, did she say that she saw any weapon?

A She did not.

87 She didn't mention a weapon one way or the other, did she?

A No, sir, there was not a weapon. The only force that was used was just the defendant slapping her, hitting her several times.

88 Did she say how many times he hit her?

A No, sir, she did not.

89 Several times? Could it have been five?

A Could have been.

90 Could have been ten?

A Could have been.

91 But you didn't notice any bruises on her face, did you?

[67] A I noticed a puffy face. No bruises.

92 Now, you took the report on the 21st, okay, from her?

A Correct.

93 And did you take that report at the County Police Station?

A County Police Headquarters 208 South 5th Street.

94 Okay. It's no longer at 208, is it?

A Yes, sir, it's still at 208 South 5th.

95 This isn't the report you took, is it?

A No, sir, it's not.

96 Okay. So these aren't your original notes?

A No, sir, they are not. Those are the Grand Jury notes that I used.

97 Now, did you show her some photographs?

A Yes, sir. She looked through all the photographs at County Police Headquarters.

98 How many photographs is that? Give me an estimate.

A There's approximately 12 large books full of photographs. I'd have to estimate thousands of photographs. Everyone that's been arrested for a felony in Jefferson County, their picture is in the mug book, [68] or the photographs.

99 Okay. Now, you don't have a copy of one of those books, do you, with you?

A No, sir. They are all at County Police Headquarters.

100 Okay. And how long did it take her, if you can recall, to look through these 12 books approximately?

A Maybe an hour, two hours.

101 Just an hour?

A Approximately.

102 How many photographs are in each book?

A I can't testify to that.

103 A hundred?

A More than that I would say.

104 Five hundred?

A I would guess maybe 150, 200.

105 And she looked at 12 hundred photographs for a positive identification of a man who allegedly raped her in an hour?

A That's estimated time, an hour, two hours.

106 Well, there's a difference. It was a short time, wasn't it, Officer?

A Couple of hours.

107 She couldn't pick anyone out you say?

[69] A Correct.

108 Did she find anyone that resembled what she thought might be her assailant?

A As she was going through the photographs I told her, I said, "If there's anyone there if his hair looks the same, or the nose looks the same, or the ears, and so forth, you can tell me that so I'll know basically what I'm looking for." And she went through the photographs. And one subject had bad acne, or rough complexion, and she said, "This is the kind of complexion he has." Another subject maybe had—

109 (Interrupting) Did you note down that photograph, or do you have a copy of it?

A No, sir, I do not.

110 Okay. And isn't it true after she went from County Police Station you took her to the City Police Station?

A This was two days after.

111 Two days later?

A She was emotionally upset that evening, it was getting early A.M. hours the next day.

112 What time was it when she left the police station?

A Approximately 3:00 A.M.

113 Was she with anyone else?

[70] A Her step-father, I believe.

114 Was he with her the whole time she looked at the photographs?

A Yes, sir, he was.

115 Do you know his name?

A I can't recall what it is right now. He is here today.

116 Okay. He was with her the whole time?

A Yes, sir, the whole time she was at County Police Headquarters.

117 All right, Officer. The next time you saw the woman was two days later?

A Yes, sir.

113 Now, you state that that would have been the 23rd?

A Yes, sir, of July, 1974.

119 What time of day was that?

A Evening hours, 3:00 or 4:00 P.M.

120 3:00 to 4:00 P.M.?

A Approximately.

121 Where did she meet you?

A Approximately 3:00 to 4:00 P.M. She met me at County Police Headquarters where I then took her to the City Police Headquarters, Criminal Investigation Section, where they have also a number of photographs [71] there of people that had been arrested.

122. Okay. And did she look through a number of books there?

A Yes, sir.

123 How many books did she look through there?

A I can't testify, I really don't recall.

124 Did she look through two?

A Several. Many.

125 Twelve?

A I can't recall.

126 How long were you there?

A Couple of hours.

127 Was the woman's step-father with her at that time also?

A Yes, sir, he was.

128 He was, all right. Now, Officer, you didn't personally know Jimmy Summitt, did you?

A No, sir, I had never met him.

129 Okay. And when was the first time you saw him?

A After the initial arrest. I can't recall if it was that next day or the next day. I did have contact with him in order to question him about the offense.

* * * *

[74] 140 Now, Officer, did the woman give you a description of the driver of the car, the second man?

A Yes, sir. That's what I was going to tell you earlier. There was supposed to have been a second person involved in this thing, a subject by the name of Willie. We had two nicknames for the defendant. She called him Jimbo. And then the second subject, who we have not located, who is the accomplice in the thing, he went by the name of Willie.

141 Did she give you a better name than that? A description of a man?

A She gave us a description of him.

142 What was that description?

A Approximately six foot one, light brown hair, medium complexion, mustache, approximately 180 pounds, medium length brown hair.

143 Medium length?

A Yes, sir.

[75] 144 Did she tell you what he was wearing?

A I don't recall. I don't think she did, no, sir. I don't recall.

145 Okay. Did she tell you about any identifying marks on this man?

A No, sir. She just—she stated of the defendant that he had tattoos on both arms that went by the name of Jimbo, but nothing about the second subject except the nickname of Willie. He was supposed to be the driver of the white '67 to '69 Chevrolet with the defendant as a passenger.

146 All right. And did she hear this driver speak?

A Yes, sir, I'm sure she did.

147 Did she tell you anything about his voice? Was it deep? Was it high pitched?

A No individual characteristics that stood out, just a normal voice.

148 Do you have any notes concerning this individual?

A No, sir.

149 None at all?

A No, sir.

* * * *

[78] 164 Okay. Now, Officer, do you have anywhere written down any statements you made to the woman while she was viewing the pictures in the picture book?

A No, sir, I do not.

165 So you don't know if you asked her "Does this look like the one", or "could this be the one"?

A Yes, sir, I remember asking that.

[79] 166 And you did ask her that?

A I said, "If there's anything noticeable about any of these people that could look like the subject that raped you just point them out to me and I'll take it into consideration while looking for the subject." But it was not written down.

167 But you do have some written notes concerning this case, don't you, that you didn't bring to court?

A That's correct.

168 Are they in your office in Police Headquarters?

A Probably on the second floor of Criminal Investigation Division, County Police Headquarters, where we keep all of our files.

169 Did she describe the dress of the assailant?

A I don't recall asking her anything about the clothing. She may have given me a clothing description but I don't recall what it is. I didn't put much emphasis on that because it's so easy for them to change clothing. And this was 20 hours after the offense occurred, they could have very easily have changed clothing. I don't recall what she told me they had on at the time except I do remember she said Jimbo had on a tank top.

[80] 170 Did she mention the color of that tank top?

A I can't recall.

171 Okay. Now, do you recall if the woman stated that the assailant who raped her had a mustache?

A I don't think she mentioned a mustache. She mentioned the fact he had a very rough complexion, evidence of acne.

172 Well, did she say he was unshaven, clean shaven, what did she say?

A I don't think she mentioned a mustache. She said the number two subject, Willie, had a mustache, I can remember that.

173 She did, okay. Did she state perhaps that this man who assaulted her might have had a cast on his leg?

A I can't recall.

174 Did she say he walked with a limp?

A I can't recall.

MR. ZEMAN: Okay, I don't have any further questions at this time. I might wish to recall the officer.

* * * *

Excerpts From Trial Testimony of Donna Furgason

[104] DIRECT EXAMINATION

By Mr. Strepey:

1 Would you state your name, your age and your address for the jury, please?

A My name is Donna Furgason, I'm 24, and I reside at 4312 Tuscarora.

2 Okay, Donna. Now, I know you are a little nervous, so I just want you to relax if you can. And I want you to tell the jury in your own words what, if anything, happened to you on July the 21st, 1974.

A I just had gotten off from work and I went to a phone booth on Taylor Boulevard and Bicknell. And when I did a car pulled in behind me and a guy got out. And he got in my side, on the passenger's side, he got in my car. And he told me to get out of my car and get into their car, which I did because I was afraid. All right. And he told me to get in the front seat between him and another guy.

3 Why were you afraid, Donna?

A Well, he had his hand in his pocket. He didn't say he had anything but I thought he did. I didn't want to take any chances.

4 Did you see anyone else around besides the two men and yourself at that time?

A No.

[105] 5 Okay, go ahead.

A And then we drove out Taylor Boulevard and, I don't know, I'm not very familiar with that area, on past there. We drove out there. And I know we went into the Candelight—it used to be a bar and a lounge. And they rode around and said they were looking for somebody's car, which they didn't stop or anything. We went back out onto the main highway, went down the road a little way in front of Convenient, and we went on up this gravel road. We went up there and turned around at somebody's house, and parked halfway down the hill.

6 Before you go any further, Donna, would you tell us what time of night this was?

A This was after midnight.

7 Okay. And what were you doing out this time of night?

A I had just gotten off from work.

8 And where were you working?

A At Parkside Restaurant.

9 Where were you going when you stopped?

A I was on my way home.

10 Okay. And was anybody with you in the car?

A No, sir.

11 Okay, go on.

[106] A And when we stopped they started talking real vulgar to me and everything. And the guy over there told me to take my clothes off and I refused, so he started hitting me. And so I hit him back, and when I did they both started calling me names, and they grabbed me. Then he told the other guy to get out of the car and then he raped me.

12 Now, Donna, when you say he raped you would you tell us did he penetrate your body with his organ?

A Yes, he did.

13 Okay. Then what happened?

A Well, then he got out of the car and the other guy come back and told me to put my clothes on. And then

he went back there and they were talking, and he came back and told me to take my clothes off. So I started taking my clothes back off and then a car came. And so they said, "Let's get out of here." They just jumped in the car and they took me back to my car, which was parked—

14 (Interrupting) Now, when you were parked in the gravel road did you see anyone else around besides the three of you? Was anyone there that could offer you help or come to your aid?

A No, sir, we were out in the country [107] somewhere.

15 Okay. What happened after that, after you got back in the car again?

A Well, he told me I had better not tell anybody about it or I'd be sorry. He asked me where I lived and—

16 (Interrupting) Who told you this?

A The guy over there. And then he said that I'd be sorry if I did, and he tried to find out where I lived and everything, which I wouldn't tell him. I just sat there until they left.

17 Okay. I know you're not looking in that direction when you say that guy over there. Who are you referring to?

A Right there (indicating).

18 What is he wearing?

A He had on a tank—

19 (Interrupting) What is he wearing today so we'll know who you are talking about?

A Oh. He's got on a beige suit with a white shirt.

MR. STREPEY: Let the record show that she is pointing to the defendant, James Summitt. Okay.

A At that time he had a mustache and he had longer hair. But I know it's definitely him.

[108] 20 Okay. Now, you were driven back to your car?

A Uh huh.

21 Okay. What happened from that point?

A Well, that's when they just told me I better not tell anybody and he tried to find out where I lived. And

he also told me that I had better meet them there the next night.

22 How did he try to find out where you lived?

A Well, he went through my purse.

23 Did he find your address?

A No, I didn't have my correct address on my license at the time.

24 Did he ask you for your address?

A Yes, he did ask me.

25 And did you give it to him?

A No, sir.

26 Did he say anything particular to threaten you, or what did he say, if you remember?

A No. To my knowledge the only thing he said was I'd better not tell or I'd be sorry. He didn't say what he'd do, you know, he just said I'd be sorry.

27 Do you think he meant it?

A Yes, because I didn't report it until [109] the next day.

28 Okay. Now, what happened after you got back to your car again?

A I went home to my sister's house where I was living. And I told my sister about it, and I told her I didn't want to tell anybody, you know, I just didn't want to tell it. And the next day my father came. And I was just trying to avoid him because my face was a little swollen and everything. And I knew he could tell, you know, because I had been crying all night and everything. So when he was getting ready to leave he talked to my sister and asked her what was, you know, the matter, that I was so upset, and she told him. And then my dad had me go down to the police station.

29 Now, the man that you have pointed to a couple of times, and you have identified as being your assailant, James Summitt, had you ever dated him before that night, or seen him?

A No, sir.

30 Did you willingly get in the car with him?

A No, sir.

31 Did you willingly submit to him?

A No, sir.

32 Was this against your will?

A Yes, sir, it was.

[110] 33 Okay. Did you subsequent to that time take a warrant against the man who raped you?

A I don't understand the question.

34 Okay. When you finally reported it to the police will you tell us what you did after that?

A After I called the report I went through some mug books.

35 Do you remember if anybody was with you when you looked at them?

A My father.

36 Anybody else there that you remember?

A Well, there was policemen around.

37 What police department was this, do you recall?

A This was the County.

38 How many pictures did you look at?

A I just looked at books full, that's all I know.

39 Did you find anybody in those photographs in the County that you recognized to be your assailant?

A No, I didn't.

40 Okay. Did you look at any other pictures?

A Yes, we went to the City a couple of days later, or the next day.

41 All right. Did you find any pictures [111] there that you looked at?

A Yes, sir.

42 Did you recognize anybody that you saw in those pictures?

A Yes.

43 Who did you see and what pictures did you see?

A It was James Summitt, and it was him. I knew, you know, I just knew it was him right off.

44 Okay. I will ask you one more time, and then I promise I won't make you any more. Would you turn around and look real good at that man over there?

A Yes, that's him.

45 Is there any doubt in your mind that is the man?

A No.

46 Are you positive?

A Yes, sir, I'm positive.

47 Absolutely positive?
A Yes, sir.
48 Okay. This area where you were raped, Donna, is this in Jefferson County, Kentucky?
A Was the area in Jefferson County?
49 Yes.
A I believe so.
[112] 50 Okay, answer any questions Mr. Zeman may have.

CROSS EXAMINATION

By Mr. Zeman:

51 Mrs. Ferguson, is it?
A Yes.
52 All right. What was your address?
A 4312 Tuscarora.
53 Who did you live there with?
A I lived there with my sister.
54 Did anyone else live there with you all?
A Her son.
55 Now, you stated that you were working that night. And where did you work?
A Parkside Restaurant. It's right up the street.
56 How long had you worked there?
A I think for about six months.
57 Six months?
A Uh huh.
58 Okay. What did you do there?
A I was a waitress.
59 Okay. And what shift were you working [113] at that time?
A I went in at 4:30 and I got off approximately 11:30.
60 11:30?
A Well, we had to clean up and everything afterwards, you know, it just varied what time we got off.
61 Okay. Were you all pretty busy that night?
A Pardon?

62 Were you pretty busy that night?

A I don't recall.

63 You don't remember?

A No, I don't.

64 Okay. And you stated that you got in your car. What kind of car do you have?

A What kind of car did I—I don't have it any longer. But I had a '62 black Chevrolet.

65 '62 black Chevy?

A That's right.

66 Okay. And how far is the phone booth that you were in where you parked your car from the restaurant?

A The phone booth is at Taylor Boulevard and Bicknell at the Hazelwood Shopping Center. Where I worked was further down, I don't know how many miles or [114] anything, on Necut Road.

67 How long did it take you to get there?

A About five minutes.

68 Five minutes to get to the phone booth?

A Uh huh.

69 Driving in the car?

A Yes.

70 Okay. And you stated that you had never seen up to that time James Summitt, is that correct?

A That's right.

71 He didn't come in the restaurant that night, did he?

A No, sir.

72 He had never been in that restaurant to your knowledge, had he?

A No, sir.

73 And when you went to the phone booth who were you calling?

A I was calling my husband.

74 You were separated at the time?

A Yes, we were.

75 And how long were you in the phone booth before—

A (Interrupting) I wasn't. I never made it to the phone booth.

[115] 76 You were never in the phone booth?

A I was never in the phone booth, no, I wasn't.

77 Okay. Were you in your car when you were approached?

A Yes, I was.

78 Okay. Were you getting ready to get out of your car?

A I had just pulled in and I was sitting there getting my money out when he got in the passenger side.

79 The other side wasn't locked?

A No, I did not have the car locked.

80 Okay. And you stated that he got in the passenger side?

A Right. Yes.

81 Okay. And did this man call you by name?

A No, he didn't.

82 Okay. What did he say to you?

A To my best knowledge from then he just told me to get out and get in their car.

83 Okay. He wasn't driving the other car, was he?

A No, he wasn't.

84 And you had never seen him before?

[116] A No.

85 Now, I realize this is difficult for you but, of course, it has to be done. You got into the car. Did you get into the back seat or the front seat of their car?

A I got in the front seat where he told me to get between the two of them.

86 Okay. And were there any other cars around or any people at that time?

A No.

87 Now, you say you drove through the Candlelight Lounge?

A Yes, sir.

88 Where is that?

A I'm not sure. Like I said, I'm not familiar with that area. I'm not sure if it's on Third Street or where it is.

89 How far was it from the phone booth? How much time did it take you?

A I don't know.

90 Five minutes, ten minutes?

A It was a little over five minutes. I mean it was over five minutes I know, because it was past where I worked at.

91 So you had to go past your place of busi- [117] ness?

A Right.

92 From the restaurant?

A Right.

93 Okay. Did you have any conversation with either of the two men in the car?

A No, they were mostly talking among themselves.

94 Okay. What did they talk about?

A They were just talking. Like I said, they had been drinking, and they were calling each other by name and everything, and that's how I knew they called him Jimbo. And they were talking about—

95 (Interrupting) What was the other one called?

A Willie.

96 Okay. Had you ever met or do you know Willie Meeks?

A No, I don't

97 The name doesn't ring a bell?

A Yes, it rings a bell.

98 Okay, now, wait a minute. You went with these two men, and did they say they had been drinking?

A Well, they had it right there with them, they were drinking at the time.

[118] 99 Was there any beer or any liquor evident in the car?

A Both.

100 There was both?

A Yes.

101 Okay. Do you remember was it dark whiskey or light whiskey, do you remember?

A I don't know.

102 Did they ask you if you wanted anything to drink?

A Yes, they did.

103 Okay. Did you drink anything?

A No, I didn't.

104 Now, you stated that they drove on further, is that correct?

A Right.

105 Okay. And they went up to a house?

A At the end of this gravel road there was a house. And they went up there and turned around and came back down the hill.

106 Was it on a hill?

A Uh huh.

107 Did you know the area?

A No.

108 Had you ever been there before?

[119] A No, I haven't.

109 Now, how long were you in the car until they stopped the car? Just give me an approximation if you can. One hour?

A No.

110 Ten minutes?

A About 15 minutes I'd say.

111 Now, you stated that one of these men struck you. Is that true?

A He did.

112 Where did he strike you?

A In the face.

113 Which side of the face?

A I'm not really sure, but I would say from where I was sitting and where he was sitting it was on my left side.

114 On the left side of your face, okay. And how many times did he strike you?

A About three.

115 Did the driver strike you?

A No.

116 Okay. Now, you stated that after he struck you he told you to remove your clothes, is that true? Now, you just answer yes or no.

A No, it was—no.

[120] 117 Okay. And you stated that he was the only one that struck you?

A That's right.

118 Okay. You were in the front seat, is that correct?

A Yes.

119 Okay. And isn't it true that the car itself was a later model car?

A It was between a '67 and a '69 Chevy I'd say.

120 Okay. You can't be sure, can you?

A No. I'm pretty familiar with cars, but I don't know the exact dates.

121 Had you ever seen that car before that incident?

A No. I mean I might have seen it but I mean it didn't mean anything to me if I did.

122 Okay. Isn't it true that the interior of that car was a dark color?

A I believe it was black, yes.

123 Could have been dark blue?

A Possibly.

124 Now, it was night, isn't that correct?

A That's right.

125 Okay. And isn't it true that that car [121] was a hardtop?

A No, that's not true. It had a dark top but I did not say it was a hardtop.

126 Could you say it was a convertible automobile, or could you not be sure one way or the other?

A I really don't know. I did not pay any attention to the car.

127 Okay. Now, isn't it true you said you struck this man back?

A That is true.

128 Where did you strike him?

A In the face.

129 Okay. Did you hit him pretty hard?

A He started bleeding.

130 He was bleeding?

A Yes.

131 Okay. Now, I realize, as I said, this is difficult for you to go back on this, but it has to be done. All right. After you hit him and he was bleeding did he strike you again?

A No.

132 He did not?

A No.

133 Okay. Did the driver of the car at that time strike you?

[122] A No.

134 Did they then ask you to remove your clothes?

A No, then they both grabbed me, like I said, and they were calling me names. And then he told the other guy to get out of the car. And then he took my clothes off.

135 He didn't ask you to take your clothes off, he took them off, is that true?

A No, he took them off. I refused to take them off.

136 And then you were in the front seat, isn't that correct?

A Yes.

137 And this is where you were allegedly raped, is that correct?

A Right.

138 In the front seat?

(The witness nodded in the affirmative.)

139 And you stated that the other man was at the back of the car, is that correct?

A To my knowledge. I don't know exactly where he was, but I would say he was behind the car.

140 Okay. Did you see at this time any other cars or any other persons?

[123] A No.

141 And isn't it true that after this alleged incident occurred that the other man came back in the car?

A Did he come back in?

142 Yes.

A He came to the window and he told me to put my clothes back on.

143 Okay. And then isn't it true that they apparently saw some car lights and then left the scene?

A No, not then. Then they went back there and talked. He told me—and when he came back he told me to take my clothes back off, which I started doing, and then—

144 (Interrupting) You had put them back on?

A Right.

145 And then he told you to take them back off but you didn't get a chance, did you?

A Because a car was coming.

146 And you left this area, is that true?

A Right.

147 Okay. Now, did you have a watch on?

A No.

148 Do you have any idea how long this took?

A Not really.

[124] 149 Would you say—

A (Interrupting) We weren't up there a real long time, no.

150 Five minutes, ten minutes?

A I'd say about five minutes approximately.

151 Okay. And then you said that they took you back in the direction of your car, is that correct?

A They took me back to my car.

152 When did they talk to you and state that they wanted to see you again?

A When we were there—when we were there at my car he told me to be there the next night, and I better not tell anybody about it or I'd be sorry.

153 Okay. But you stated that these men asked you for your address, is that correct?

A That's right.

154 But you wouldn't give it to them?

A No.

155 And you had no identification on you?

A I had my driver's license, yes, but at that time I had just moved from a previous address, and the address wasn't the one I lived at.

156 Okay. So you didn't tell them, and apparently they had no way of knowing where you resided, is that correct?

[125] A Right.

157 Okay. Now, did you give a description of the driver of that car to the police?

A I did.

158 Okay. What description did you give?

A He was tall, big built, and he was in his 20's.

159 Okay. And isn't it true that these two men told you to meet them at that same spot the next night?

A Yes.

160 Okay. Did they say what time?

A No, they just told me I better be there—no, they said about the same time. They said, "Be here this time tomorrow night."

161 Okay.

A But they didn't say it, he said it.

162 Just one of them?

(The witness nodded in the affirmative.)

163 Okay. Now, you are indicating that the defendant told you—

A (Interrupting) The other guy, he didn't bother me except the one time I told you he grabbed me.

164 Okay. Now, I asked you before if you had heard of a Willis Meeks?

[126] A Right.

165 And isn't it true that you went to this spot the next night with the police, and there was in fact a Willis Meeks driving an automobile around there, the same make and model approximately as the vehicle you were in?

A No, that's not true, cause I didn't go back. My father went back.

166 Your father was with the police?

A Right, I wasn't with them. I didn't want to go back.

167 And was there a Willis Meeks—

MR. STREPEY: (Interrupting) Objection. That's hearsay. He can call the witness if he wants to.

THE COURT: Sustained.

168 Now, Mrs. Furgason, where did you go after the incident when you were taken back to your car?

A I went to my sister's.

169 Okay. And how much time approximately was there from the time that this man first came up to you when you were in the car, and when you left, got back to your car and left the scene, approximately?

A From the time I got into his car back to my car?

170 Yes.

[127] A I'd say approximately 45 minutes.

171 Approximately 45 minutes?

(The witness nodded in the affirmative.)

172 Now, where did you go at that time?

A At what time?

173 When you got back to your car. Where did you go?

A I went to my sister's.

174 And that address was 4312 Tuscarora Way, isn't it?

A That's right.

175 How much time did it take you to get to your sister's?

A About three minutes.

176 Three minutes. She lives very close?

A Right behind the shopping center.

177 And was she awake?

A Was she awake? No, she wasn't.

178 Did you awaken her and tell her what had happened?

A Yes, I did.

179 You did. She is not here today, is she?

A No, she isn't.

180 Now, what time of night was this when you got back to your sister's house, if you know?

[128] A It was around 1:00 I'd say.

181 Okay. Around 1:00?

(The witness nodded in the affirmative.)

182 1:00 in the morning, correct?

A Right.

183 Okay. Of the next day?

A What do you mean of the next day? It was still that morning.

184 Apparently the—you stated that you were working until 11:30?

A Right, okay. It was the next day then.

185 And you stated that you told your sister that, what had happened?

A Yes.

186 When you got home you woke her up and told her. Okay.

(The witness nodded in the affirmative.)

187 And isn't it true that you didn't go to the hospital then or call the police?

A That's true, I didn't.

188 And isn't it true that you waited in fact until the next day when your father came home?

A That is true.

189 Okay. How long had you been living at your sister's?

[129] A I'd say—I don't know for sure.

190 Just an estimate.

A I'd say a couple of months.

191 Now, when your father came by isn't it true that you didn't tell him right away what had happened?

A No, I didn't tell him.

192 And isn't it true that he in fact asked you is something wrong?

A No, he asked my sister.

193 He asked your sister?

A And she told him. And then he came and told me what she told him.

194 Okay. So you're saying that your sister told him and then he asked you?

A Right.

195 Okay. Did you call the police right away when he suggested it?

A We went right then to the police. We went right and talked to the police, yes.

196 From your sister's house that next day do you have any estimate as to what time it was of the day that you would have reported this?

A It was in the afternoon.

197 Was it in the late afternoon or early [130] afternoon?

A I'd say about 3:30 or 4:00.

198 When you went to the police station?

A I believe so. That's been two years.

199 And when you got to the police station what happened?

A Well, we talked to these detectives. And they were on the City, and they needed the County. So I was at the hospital with the City Police Officer and they had to call in the County Police.

200 Okay. Did they ask you to go back to the scene with them, the City Police Officers?

A No, the City Police didn't take care of it, it was the County Police.

201 Okay. When you told them what happened they said, "Well, we better call the County Police"?

A Right. And I was at the hospital at that time.

202 So you went from the police station after you reported the incident to the hospital, is that correct?

A Right, I believe so.

203 Okay. And when you went to the hospital what happened?

A Well, then they took us to the police—[131] I had an examination.

204 Okay. Let me ask you this: Do you remember the name of the doctor you saw?

A No, I'm sorry, I don't.

205 Don't remember, okay. Do you know if he was a regular doctor there or a student or what?

A I have no idea.

206 Okay. Did they take a report from you at the hospital?

A What do you mean by a report?

207 Did they write anything down that you told them? Did they make you sign anything?

A Well, they had their report.

208 But did they run any tests on you?

A Yes, I had an examination.

209 Okay. Now, where did you go from the hospital? Let me ask you this: How long were you at the hospital approximately?

A I don't remember.

210 You can't remember?

A Uh uh.

211 Okay. Where did you go after you were at the hospital?

A That's when we went down to the County I believe.

[132] 212 To the County Police Station?

A Yes, sir.

213 Okay. Did you talk to any police officer there?

A Yes, they took a report.

214 Did you see Detective Sanders there?

A Yes.

215 Was that the first contact you had with Detective Sanders?

A Yes, sir.

216 Okay. And he took a report from you, isn't that true?

A Him and another detective.

217 Do you remember that detective's name?

A Horine, or Horen, or something.

218 Now, did they ask you at that time to look in any picture books?

A No. At that time they drove me—some more officers drove me out to the location.

219 So you did go back to the location. Was it with the County Police Officers?

A Uh huh.

220 Were they in uniform or plain clothes men?

A No, they were plain clothes men.

221 Was Detective Sanders one of them?

[133] A No, I don't think so. No, he wasn't.

222 What did these officers ask you?

A They were trying to find out where the location was. And I gave them a general idea. And so we started driving around till we found it.

223 Okay. Did you get out of the car at that location?

A I don't believe so.

224 Did they get out of the car?

A I don't remember.

225 Okay. Then after you went out to the location where did you go from there, back to the County Police Station?

A That's when we looked at some mug books.

226 What time of night would that have been, do you remember?

A I don't have any idea.

227 Was it dark outside?

A I believe—I don't know. I don't remember, I really don't. Yeah, I think it was, because I think it was dark when we were out in the car.

228 And when you got back to the police station you can't say what time it was, can you?

A No, I can't.

229 Did you look at a lot of pictures?

[134] A Yes, I looked at quite a few.

230 Who helped you look at them?

A As I said, me and my father were looking at them.

231 Did Detective Sanders help you, or any other police officer?

A I don't think so. They were just coming in and out, you know, asking if we found anything. But nobody really helped me.

232 Do you remember how you looked at the pictures? Were they in a book?

A Yes.

233 Can you estimate how big, how thick, the books were?

A Approximately they were different sizes. Some of them were big and some of them were bigger, and there were several pictures on each page.

234 Do you remember the number of books that you looked at?

A No, I'm sorry.

235 It was a long time ago, wasn't it?

A But I still know it's him.

236 Now, when you looked at these books do you remember if it was ten books you looked at or 20 books?

[135] A It was more than ten I'm sure.

237 Okay. And how long were you in the County Police Station looking at these books?

A I don't know.

238 Was it a long time?

A It took three or four hours I'd say.

239 Could it have been more than four hours? You looked at a lot of pictures?

A I don't remember.

240 But your best estimate is three to four hours, is that correct?

A Yes.

241 Now, did you see anybody in these books that might have resembled your assailant?

A No.

242 Nobody at all?

A No.

243 Okay. And after you left the police station where did you go?

A I think I went home.

244 Were you with your father still?

A Yes.

245 He was with you when you looked at the pictures?

A Right.

[136] 246 The next day isn't it true that you went back to look at more pictures?

A No, I don't think it was the next day, I think it was the day after.

247 So two days later you went and looked at more pictures. Did you look at them in the County Police Department?

A No, it was in the City this time.

248 Okay. Do you remember how many pictures or how many books you looked at then?

A It was more than before.

249 Okay. So it was more than ten books and a lot of pictures?

A I mean there was more books there, but I'm not sure I went through that many. But I know I went through quite a few before I found him.

250 And was anybody helping you look at these pictures?

A My father was there also.

251 Your father was there then, too, wasn't he?

A Yes.

252 Now, so the first time that you saw a picture who resembled your assailant was in the City Police Station, isn't that true?

[137] A He didn't resemble it, it was him.

253 But the first time you saw this picture was in the City Police Station?

A It was in the City, yes.

254 And you had looked at a great number of pictures before this, and during that day, isn't that correct?

A That's right.

255 Okay. And when you found this picture who did you tell?

A I told my father, and then he went and got a police officer.

256 And he brought the police officer in, didn't he?

(The witness nodded in the affirmative.)

257 Okay. Now, this day——now, you say it would have been two days after you went to the County Police Station. All right?

A I think.

258 Okay. Did you at that time take out a warrant for this man?

A At that time? I don't know if I did then or not.

259 Okay. Do you want a minute to compose yourself? Okay.

[138] MR. ZEMAN: Judge, should we call a recess? I realize this is hard.

THE COURT: Get her a cup of water.

MR. ZEMAN: We can call a recess.

THE COURT: Do you want to go with her and get a glass of water?

THE WITNESS: No, I'll be all right.

(At this point there was a short pause.)

260 Now, Mrs. Furgason, you stated that the other man in the car was named Willis, or that's how he called himself?

A Willie.

261 And isn't it true that you didn't find any pictures of him?

A That's right.

262 Okay. Were you looking for both men or just one?

A I was looking for both of them.

263 Okay. And isn't it true that you stopped when you found a picture of James Summitt?

A That is true.

264 You didn't look any further for the other man, did you?

A That's right.

265 Now, so after you saw this picture your [139] father brought in the policeman and said there's the picture, and it wasn't at this time, was it, when you took the warrant?

A I don't think so, no.

266 Okay. And wasn't it in fact some ten days later when you took the warrant?

A It seems like it.

267 Okay. Did you talk to any of the police officers at that time about that picture that you had picked out?

A What do you mean by talk to them?

268 Did any of you, any of the police officers, ask you if you were sure that was the man?

A Yes, I did positively identify, yes. They did want to know if I was sure that was him.

269 Excuse me?

A Yes, they did want to know if I was sure it was him.

270 Okay. And which detective asked you, if you remember?

A I don't remember.

271 Were there several of them?

A I don't remember that, either.

272 Okay. Did Detective Sanders ask you if you were sure that was the man?

[140] A At that particular time?

273 Yes.

A No, he wasn't there.

274 Okay. After that did he ask you?

A Yes.

275 Now, after you saw this picture and you picked it out where did you go?

A I don't remember.

276 You don't remember. Did you go back to the County Police Station for more reports or did you go home?

A I don't remember.

277 Okay. Now, after you left the police station, and you waited some time to take a warrant out for this man, did you meet with Detective Sanders after you had taken the warrant out?

A I don't remember that.

278 You don't remember. When was the next time you saw the picture of the man?

A When is the next time?

279 Yes.

A I saw the picture?

280 Yes.

A I think it's when I took the warrant out.

281 Okay. So some detective would have been [141] with you when you took the warrant out, isn't that true?

A I think so.

282 And would that detective have been Detective Sanders?

A Yes. If it was anybody it was Rick.

283 You call him Rick?

(The witness nodded in the affirmative.)

284 Have you talked to him since—well, let me rephrase it. Did you see him after he took the warrant out, Detective Sanders?

A At court.

285 And that was the next time you saw James Summitt, wasn't it?

A I think it was the next time.

286 In the Courthouse, isn't that true?

A Right.

287 Okay. You never saw James Summitt at the police station, isn't that true?

A That is true.

288 Okay. Did you come down and talk to any detective, Detective Sanders, after you took the warrant out and before you went to court?

A No, I don't believe so.

289 Did you talk to him on the phone?

A I don't think so.

[142] 290 You can't be sure but you don't think so, is that true?

A This has been a long time, I don't remember all these details.

291 Okay. I have to ask these questions. I have to ask them. Now, okay, going back, isn't it true that the first time you saw James Summitt after you picked this picture out was in the Courthouse?

A No, the first time I saw him was in my car.

292 After you picked the picture out, Mrs. Furgason, isn't that true?

A Yes.

293 All right. Now, how many times after that did you see James Summitt?

A Every time we went to court. I don't know.

294 Okay. So you saw him a number of times after that, isn't that true?

A That's right.

295 Was Detective Sanders with you?

A Yes. (Witness crying.)

296 Okay.

MR. ZEMAN: We can give her a minute, Judge.

[143] THE COURT: Okay.

(At this point there was a short pause in the proceedings.)

297 Now, Mrs. Furgason, I want you to go back, and I'm going to ask you isn't it true that the man who assaulted you had a limp?

A I don't remember. I never saw him walk.

298 Did he have a cast on his leg?

A I don't remember that.

299 You don't remember that, okay. And do you remember on the times that you saw James Summitt in the Courthouse did he have a cast on or did he walk with a limp?

A I didn't—I didn't look at him that way.

300 Now, did you—excuse me, let me go back. Isn't it true that you were in the same room with James Summitt in this Courthouse at one of the court appearances?

A That is true.

301 Okay. And isn't this true, that this was after you had picked his picture out, and after you had been to court a number of times on this case? Isn't that true? When you were in the same room with him.

A What do you mean by a number of times?

302 One time, two times. You said you had [144] been to court a number of times against him and had seen him in that courtroom.

A Yes.

303 Okay. Then after those number of times isn't it true that you were in the same room with him with a prosecutor? Isn't that true?

A Yes, we was in the same room.

304 Okay. And isn't it true that after you were in the same room with him at another court appearance you had seen him again, isn't that true?

A Would you repeat that, please?

305 After you were in the same room with James Summitt—

A (Interrupting) Yes.

306 At one of the numerous court appearances after you were in the same room with him—now, excuse me, I don't want to confuse you, it wasn't a room like this, it was a smaller room like a room like that size.

A Right.

307 That after that occasion you had even seen him again in a court appearance?

A I believe so.

308 So you saw him a number of times and you were even in a small room with him, that's true, isn't it?

[145] A Yes, that is true.

309 Now, I realize that it's been two years, and as you stated that's a long time to remember some details, but isn't it true that you found his picture and said this man was the one after you had seen a lot of pictures, and been talked to by a lot of police officers, and had been under a great deal of stress, isn't that true?

A I had been through a lot of pictures and stuff, yes.

310 And isn't it true that you were under a great deal of distress as you are today?

A Yes, that's true.

311 It's not easy, is it, to come into court and say that this happened, and there is the man that did it, is it?

A Yes, it is easy, because that's him.

312 Well now, let's see. Isn't it true that it's easy if you've seen him a number of times? Isn't that true?

A I knew his face right away. No, it's not, because I picked him right out of there.

MR. STREPEY: He is arguing with the witness. She's answered the question two or three times.

THE COURT: Sustain the objection.

[146] 313 All right, Mrs. Furgason.

MR. ZEMAN: Okay, I don't have any further questions at this time.

MR. STREPEY: I just have a couple or three.

REDIRECT EXAMINATION

By Mr. Strepey:

314 Donna, how old were you in July of 1974 when this happened?

A 22.

315 Can you estimate the length of time that you were in the same automobile with these two men from

the time that you were abducted until the time they let you out?

A Approximately 45 minutes.

316 During this period of time did you get a good look at the face of the man that raped you?

A Yes, I did.

317 Is there any doubt in your mind that's the man?

A No. We were right in the light at first when we went through that bar. We were in the light and I know that was him.

[147] 318 So today when you say that James Summitt is the man that raped you you are not saying it because you saw the pictures, you are saying it because he was the man in the car that night?

A Yes, he was.

319 Did you notice was he wearing a long sleeve shirt or a short sleeve shirt, do you remember?

A He had on what they call a tank top, and he had tattoos on his arms. That was one thing I'll never forget.

320 Could you see the tattoos on the pictures that you saw in the police station?

A Not to my knowledge, no.

MR. STREPEY: Thank you very much, Donna, that's all.

RECROSS EXAMINATION

By Mr. Zeman:

321 Mrs. Furgason?

A Yes.

322 Now, of course, we have been over this a number of times, and I'm going to ask you just one question. Have you ever seen anybody that you thought was somebody else in your life? Has that ever happened to [148] you?

A Yeah, it happens to everybody.

323 Okay. If you're honest you have to say yes, wouldn't you?

A That is true.

324 And isn't it true that you may have seen someone you thought was someone else several times? Isn't that true?

A Not several times. I'd say a few times, a couple.

325 Cause that happens, doesn't it?

A Yes, it does.

326 Okay. And when you stated that—when you pointed to him and said he's the man—

A (Interrupting) You don't forget somebody—

327 (Interrupting) Isn't it true that he is also the man in the picture and who you had seen before, isn't that true?

A Yes, it is true.

MR. STREPEY: Judge, she has answered the questions before, the same line of questions before.

THE COURT: All right. Is that the case?

MR. STREPEY: That is the case, Judge.

THE COURT: Do you remember where the tattoos were?

[149] THE WITNESS: On his arms. I know he had them up here.

THE COURT: On the forearm?

MR. STREPEY: No, that's the biceps.

THE COURT: Biceps, I mean. On both arms?

THE WITNESS: I believe so, yes. He had them on both.

(Witness excused)

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Excerpts From Trial Testimony of James Willard Summitt

* * * *

[168] 79 Now, Jim, when you were in court these last few times, and in that jury room with Donna Furgason and those police officers, what did you have on?

[169] A I had on a shirt, a short sleeve shirt, and a pair of Levis. I think—I know I had a short sleeve shirt on because the prosecutor said, "Let me see your arms."

80 Why did he do that?

A Because I had tattoos on my arms.

81 Okay, were you in custody then?

A Yes, I was.

82 Okay. And you faced that girl as close as you are to that gentleman there in that front row?

A Yes, sir.

83 And in those prison clothes with the short sleeve shirt on?

A Yes, sir.

* * * *

[180] 134 Are you saying on direct, Mr. Summitt, that the first time that you can recall, or that you want to admit, that this young lady saw you with your arms bare, and the tattoos, was in that conference room [181] here in this Courthouse?

A Yes, sir. Right, correct.

135 And unless you raped her there's no ay that you know that she would have known before then that you had tattoos on your arm, is that what you are saying?

A What I'm saying is the lady seen the tattoos on my arm in the jury room.

136 And you are claiming that is the first time that she ever had an opportunity to see your arms?

A Well, I imagine. The prosecutor made me show my arms to everybody in the room.

137 I'm asking before that, Mr. Summitt.

A No. The first time I ever seen the lady, like I told everybody, was in County Police Court.

* * * *

Defense Objection to In-Court Display of Tattoos Worn by Defendant

* * * *

[188] MR. ZEMAN: The prosecutor has asked that we put the defendant, James Summitt, back on the stand for the purpose of displaying his tattoos to the jury. And I am objecting to him displaying his tattoos to the jury for the reason that the prosecuting witness did not

state what type or what the tattoos looked like on the defendant's arms. I am also objecting on the grounds that the defendant has stated that he has tattoos, and that without putting the prosecuting witness back on the stand to state what type of tattoos, and what these tattoos looked like, would be prejudicial to the defendant to have [189] him display those tattoos to the jury.

THE COURT: Overruled. I will let the Commonwealth go ahead and do it.

* * * *

In-Court Exhibition of Tattoos Worn By Defendant

* * * *

[214] THE COURT: He can stand up where he is if he wants to. (To the defendant.) Just roll your sleeves up.

MR. ZEMAN: Take your coat off.

THE COURT: Take your coat off and roll your sleeves up, Mr. Summitt, so we can see your arms.

MR. STREPEY: Let the record show that the defendant was exhibiting tattoos on his forearms and upper arms.

MR. ZEMAN: Roll up, if you would, Jimmy, your right sleeve. And would the record show that the name Jimmy is on the right biceps.

* * * *

Excerpts From Trial Testimony of Detective Rick Sanders

* * * *

[228] A No, sir, I took the description the same evening at 2330 hours, 11:30 P.M. The offense happened at approximately 1:30 A.M. that morning and I took a description that afternoon.

17 Okay. And that 's how many hours?

A Approximately 20.

18 20 hours later?

A Yes, sir.

19 Okay. And isn't it true that the description of the assailant was a white male, 180 to 190 pounds?

A Yes, sir, it was.

20 And isn't it true that the description stated that the man called himself Jimbo?

A The description was that the subject was a white male, in his 30's, approximately 5 foot 8, 180 to 190 pounds. These are approximate figures.

21 It could be more, couldn't it?

A It could very easily, could be less. We find a lot of cases the descriptions are not perfect because the victim is so shaken and so forth she can't give a perfect description of the subject. She gave us a very good brief description of him. A white male, in his 30's, [229] approximately 5 foot 8, 180 to 190 pounds, had tattoos on both arms.

22 Did she describe the tattoos?

A No, sir, she did not. Subject had rough complexion, acne type face, medium length hair, brown hair or dark hair.

23 Subject have any facial hair?

A I can't recall her saying that.

24 You can't recall?

A Can't recall.

25 Okay. And isn't it true that you took the prosecuting witness and showed her various pictures in various picture books?

A Yes, sir. As I stated before that evening we took her to the second floor.

26 Just answer yes or no.

A And showed her various photographs. And two days following that we took her down to City Police Headquarters where she viewed numerous photographs again, and positively identified defendant's picture.

27 Okay. And isn't it true that that picture that you showed her was a picture that showed the defendant's arms, and was a picture that showed tattoos, isn't that true?

A No, sir, I don't believe it did.

[230] 23 Now, isn't it true, Officer, that you stated yesterday that she looked through perhaps as many as 12 books of pictures?

A Yes, sir, I estimated that.

29 And did you say that that was a two hour period?

A Approximately.

30 And isn't it true that you said that the number of pictures in the book differ on each page? Didn't you say that?

A I don't recall saying that.

31 Isn't that true?

A They are different people, they will differ.

32 Isn't it true that there's a different number of pictures on each page?

A It follows a general format. They all have basically the same number of pictures, they are in the same sequence.

33 Isn't it true, Officer, that you said some books are larger than others?

A Yes. We have them broken down into different offenses, sex offenses, theft, robbery, and so forth. We first let her go through the sex offense book, and if she doesn't do any good locating the subject [231] we then bring the remaining books and she looks through them also.

34 Isn't it true, Officer, that the pictures in that book are different because they are different size pictures?

A No, all of the photographs are the same in those books.

35 And isn't it true, Officer, that that picture in the book that you showed her showed the defendant with tattoos on bare arms?

A No, sir, it did not.

36 Now—okay. Isn't it true that you were with the prosecuting witness and her step-father each time they looked at these pictures?

A Yes, sir. I may have not stayed with her, but I was in and out during that time. Yes, sir, I was.

37 Well, is it true or not that you were with her each time she was—

A (Interrupting) It's true I was in and out while she was—

38 (Interrupting) You weren't with them all the time?

A No, sir, I wasn't.

39 Isn't it true that the prosecuting wit- [233] ness some two or three days after the incident viewed a picture of the defendant where she could see tattoos on bare arms?

A She saw the photograph two days after the offense happened.

40 Isn't it true that that picture did in fact depict him with tattoos on his arms?

A No, sir, I don't think it did.

41 How would you know if it did or not if you weren't in the room?

A She showed me the picture after she identified him. She said this is the man positively raped her. Then I said, "This is the man?" I looked at the photograph. She said, "I'm positive this is the guy that did it." And she showed me the photograph in the book.

42 After she viewed this photograph then you put out a pick-up for that subject?

A Yes, sir, we did. And we also attempted to locate the subject. But all the information we had was false, he had given false information to several people.

43 Isn't it true that that subject, of course wasn't located until he turned himself in to his own probation officer some three weeks after the incident?

A That could be true, I'm not sure. [233] Detective McQuillen and Detective Allen made the arrest. We had gone to the probation officer, and everything he had was false. He said he couldn't help us any further, all he had was lies on his information sheet.

44 Isn't it true that when you went with the prosecuting witness to take out the warran that you helped her take that warrant out?

A Yes, sir. We do that on just about every case.

45 Isn't it true that that was some two weeks after the incident?

A She took the warrant on July 31st. The incident happened on July 21st. Ten days later.

46 Isn't it true you made her take out a warrant because you didn't think you had enough information to pick that man up?

A No, that is not true. We made her take the warrant because we couldn't locate James Summitt.

47 And, Officer, isn't it true that after she picked this man's picture out of the picture book that you told her that this was in fact the man, and you bolstered her identification?

A No, sir. There's no way I could tell her who raped her. She said, "This is the man that raped me. And I identified him as James Willard Summitt.

[234] 48 Isn't it true that you in fact talked to her and worked the case yourself from that point on?

A Yes, sir, I worked the entire case.

49 Officer, isn't it true that you did not arrest the defendant yourself?

A No, sir, as I said before Detective McQuillen and Detective Allen made the arrest.

50 Isn't it true that you yourself made no scientific test on the defendant?

A No, sir, I did not.

51 Isn't it true that you took no physical evidence from the defendant, clothing, possessions or fingerprints? Isn't that true?

A There was no reason to take any.

52 Isn't that true?

A Yes, sir.

53 You took no fingerprints or made no scientific tests?

A As you asked me before, each case is different. In this case we didn't need any clothing or hair specimens.

54 Isn't it true that that defendant, Jimmy Summitt, never appeared in a lineup to be identified in person by this prosecuting witness?

A That is. She was sure when she saw the [235] photographs that was the subject, and she positively identified him again in court.

55 Isn't it true that you were with her in these various courts?

A No, sir, I wasn't with her.

56 Isn't it true, Officer, that you were with her in circuit court on numerous occasions when she had an opportunity to view Jimmy Summitt some months, years, after the occurrence of this incident?

A No, sir, I don't believe he was here.

57 Isn't it true that you were in fact in a small room in this circuit court with the prosecutor, another police officer, prosecuting witness and Jimmy Summitt?

A I was in this courtroom here, sir.

58 In a small room?

A About the third time it was called for trial.

59 Three times?

A Approximately. It was called two or three times in preliminary hearings.

60 Isn't it true that you were here all those times?

A Yes, I was.

61 Isn't it true that you were with this [236] girl, and you were with her each time she saw the defendant?

A No, sir, I wasn't with her in Quarterly Court.

62 In circuit court you were?

A Yes, sir, in circuit court.

63 Isn't it true that this defendant on these numerous occasions was dressed in a T shirt so that his bare arms and his tattoos would show?

A I don't recall each contact. I know one time, or times I can recall, he had jail clothes on.

64 What is jail clothes?

A Gray sweat shirt. I don't recall seeing any.

65 Could it have been a white T shirt?

A The best I can recall.

66 Isn't it true that jail clothes could be white T shirt?

A I guess it could be.

67 Isn't it true, Officer, that you asked this prosecuting witness if she was positive that this was the man? Isn't that true?

A Yes, sir. I want to make sure I've got the right man before I place him under arrest.

68 Isn't it true that you told her this man [237] has tattoos and identifying marks on his arms?

A No, sir, I did not.

69 Isn't it true, Officer, that that picture that you first showed her two years ago had bare arms and tattoos on it? Isn't that true?

A No, sir, it is not true.

70 Officer, do you have that picture?

A No, sir, I do not. I went to the City and tried to get a copy of it. They have new photographs.

MR. STREPEY: (Interrupting) You can explain it. If he opened the door—

MR. ZEMAN: (Interrupting) If he wants to ask on rebuttal he can.

THE COURT: You can ask him.

71 So you don't have that picture, do you?

A No, sir.

72 Now, you have had training in police operations, haven't you?

A Yes, I have.

73 And you stated before that you have had opportunity to perform some scientific tests?

A Yes, I have.

74 Have you ever heard of the pubic hair test?

A Yes, sir, I have.

* * * *

[244] 109 Isn't it true, Officer, that you did in fact base this investigation on a photograph?

A No, sir, I didn't base the investigation on the photograph. I investigated the entire case from start to finish—

110 (Interrupting) Just say yes or no. Your answer is no?

A She positively identified the subject from the mug books.

111 Would you answer the question?

MR. STREPEY: Judge, he is allowed to answer the question.

MR. ZEMAN: He is explaining himself. I think Mr. Strepey can ask him to do that.

THE COURT: He can explain his answer if he wishes. We have covered this quite a few times, I think.

112 Officer, isn't it true in fact that that photograph, that you don't have today, did in fact depict Jimmy Summitt's arms and his bare chest with the tattoos, and didn't you in fact show that to that girl, and that's the first time she saw those tattoos? Isn't that true?

A No, sir, it is not.

MR. ZEMAN: I don't have any further [245] questions.

THE COURT: Do you have anything?

MR. STREPEY: Just a couple, Judge, it won't take long.

CROSS EXAMINATION

By Mr. Strepey:

113 Detective, when you first spoke to the victim at 10:30 or 11:30 that evening did she give you a description of her assailant?

A Of the two assailants, yes, sir.

114 Did that description include the tattoos on his arms?

A Yes, sir, it did.

115 Was that before she saw any photographs?

A Yes, sir, that was when I first met her she gave me the description.

116 Are you familiar, and have you looked at the mug books in City and County?

A Yes, sir.

117 Is it not true that the mug books shows from the chest on up and do not normally show the entire body?

A That is true, sir. They have a number [246] that's put over their chest which would cover the chest.

118 So a person's arms would not be exposed in a photograph like that?

A Their upper arms could but their forearm would not.

119 All right. On the question of physical evidence, did you have anything to take fingerprints from, or lift fingerprints from?

A No, sir, I never could locate the car that was supposed to be used in this, because the defendant was the No. 2 man and was not the driver of the car.

120 Did you have any blood samples to compare blood samples with?

A No, sir, I did not.

MR. STREPEY: All right, thank you.

REDIRECT EXAMINATION

By Mr. Zeman:

121 Officer, isn't it true that the prosecuting witness stated that she slapped the defendant?

A Yes, sir, it is.

122 And isn't it true that she said his face was bleeding?

[247] A Yes, sir, she did. She thought it might be bleeding.

123 And isn't it true that it is good police practice to take blood samples off her clothing, or take her clothing into evidence?

A As I said before, in some cases you would take the clothing and in some cases you would not. In this particular case I did not take any clothing.

124 Okay. Now, Officer, your office is in the Homicide Department, isn't it?

A Yes, sir.

125 Okay. And that's on the third floor of the County Police Department, isn't it?

A Yes, sir, it is.

126 Okay. And you have to go through a few doors after you get out of the elevator to get there, don't you?

A After you get out of the elevator?

127 Yes, sir.

A No, sir, you go directly into it.

128 Excuse me?

A Homicide and robbery is located together in the same office. After you get off the elevator you take a left in a hallway. You don't pass any doors.

129 There's no doors on your right?

[248] A No, sir, there's not.

130 Isn't it true, Officer, that there's several doors on your right, and homicide is at the end of that hall?

A No, sir. You are talking about two different elevators. There's two different ways to get to the Homicide Office. The one we went to, the one I always go up, there's no doors.

131 But isn't it true that in the Homicide Office you have a great number of pictures on the wall?

A Yes, sir.

132 Don't those pictures in fact show waist up and bare arms and bare chests and the whole arms? Don't they in fact show the arms?

A No, sir. If they've got a short sleeve shirt on they might show the arms.

133 But don't they in fact have a lot of pictures that show arms?

A Yes, sir, they do.

134 They do. And isn't it true that if someone looked at a picture like that they'd see any identifying marks on those arms such as tattoos?

A If they had a short sleeve on or if they had no shirt on they would.

135 And isn't it true that the picture of [249] James Summitt was like that, and he had a short sleeve on that showed his tattoos?

MR. STREPEY: He has answered that question at least six times, Judge.

THE COURT: I don't know what the question was. What was the question?

MR. ZEMAN: The question was, Judge, isn't that picture shown of Jimmy Summitt was one where his arms and tattoos showed through.

THE COURT: He's answered that five or six times.

MR. ZEMAN: I have no more questions.

THE COURT: All right, sir, you are excused.

(Witnessed excused.)

THE COURT: Is that the case for the defendant?
MR. ZEMAN: Yes, Judge.

The following proceedings were has at the bench in whispered tones:

[250] MR. ZEMAN: I make a motion to take the jury to the Homicide Office where these pictures are displayed all over the walls and let them see them for themselves. They have full length pictures. I think it's very close, it's next door.

THE COURT: He admitted there were some of them that had pictures like that hanging on the wall over there.

MR. ZEMAN: I realize that, but I think that the jury could take cognizance of the fact that those—

MR. STREPEY: (Interrupting) Those are different pictures.

MR. ZEMAN: I don't know, he doesn't have the picture.

THE COURT: He doesn't have the picture of the defendant.

MR. ZEMAN: He doesn't have that picture, it's not here.

MR. STREPEY: No, that's not the same type of picture that's in the mug books, though.

* * * *

Judgment Entered by Jefferson Circuit Court
On June 4, 1976

AT A COURT HELD JUNE 4, 1976

This day, the defendant was brought into court by the Sheriff. Comes his attorney Mr. Zeman. This case being called on the defendants motion for a new trial herein, the court being advised, overrules said motion herein. The defendant was advised of his legal right to appeal this judgment and if he could not afford counsel, the court would appoint him counsel and if indigent will be allowed to proceed in forma pauperis, the defendant acknowledge receipt of said information herein. The defendant was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advise of counsel, none being shown, it is ordered and adjudged that the defendant being —— years of age, be taken by the Sheriff of Jefferson County to the jail of Jefferson County and from there by the Sheriff of said Count and transferred to the custody of the Department of Corrections at such location as the Department shall designate and remain in their custody for a period of not more than life. Ordered that he be and is remanded to jail.

Opinion Rendered by the Supreme Court of Kentucky on April 22, 1977

Summitt v. *Commonwealth, Ky., 550 S.W.2d 548 (1977)*

Rendered: April 22, 1977

SUPREME COURT OF KENTUCKY

SC-82-MR

JAMES WILLARD SUMMITT, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND DIVISION
HON. JOHN P. HAYES, JUDGE
INDICTMENT NO. 152462

OPINION OF THE COURT BY JUSTICE PALMORE

AFFIRMING

James Williard Summitt appeals from a judgment sentencing him to life imprisonment pursuant to a jury verdict finding him guilty of rape. KRS 435.090 (now superseded by the Kentucky Penal Code, eff. January 1, 1975).

Shortly after midnight of July 20-21, 1974, Donna Jean Furgason was abducted by two men and raped by one of them. Some 20 hours later, after having reviewed over 1200 "mug shots" at the headquarters of the Jefferson County and Louisville police, she identified a photograph of the appellant as the man who raped her. In due course he was arrested and brought to trial. His defense was a denial that he was the guilty party.

The first contention on which Summitt relies for a reversal is that the trial court erred in permitting a

police detective to relate substantive details of the report Donna had given him before she looked through the photographs. He stated, for example, that she was fearful because her assailant had warned her that if she reported the incident to the police he would do harm to her and her family, and that she described him as follows:

"The subject that had done the rape was supposed to have been a white male, in his 30's approximately five foot nine, 180 to 190 pounds, had a rough complexion and had tattoos on both arms. She said that she heard him—she knew that he went by the name of Jimbo, that was his nickname, and that she had learned this during the offense."

The detective was the first witness called by the Commonwealth, and when he began to testify from his report Summitt's counsel objected on grounds of the hearsay rule. In overruling the objection the trial court commented, "She is going to testify."

We agree that from the standpoint of this witness the statement received from the victim was purely hearsay and at this stage of the trial was inadmissible. As it developed, however, and in our opinion would inevitably have developed, the trial focussed on the reliability of the identification. Even had Donna testified before the detective, the only avenue of defense was to discredit her initial identification of Summitt from the police photograph. Once that attack was made through cross-examination, evidence that she had accurately described him before she saw the photograph was competent for corroborative purposes. Cf. 4 Wigmore, Evidence §§ 1130, 1132 (Chadbourne rev. 1972); Preston v. Commonwealth, Ky., 406 SW 2d 398, 403 (1966). So, while the detective should not have been allowed to give the details of what Donna said to him during their first interview until after she had appeared as a witness and had been cross-examined, the error was erased by subsequent legitimation of the incompetent testimony.

Before the first witness was introduced, counsel for the appellant unsuccessfully sought an evidentiary hear-

ing on his motion to suppress or exclude Donna's in-court identification of Summitt. United States v. Wade, 388 U.S. 218 (1967), is cited for the proposition that the denial of such a hearing is constitutionally fatal. As the Commonwealth points out, however, the pertinent decision with reference to photographic identification is Simmons v. United States, 390 U.S. 377 (1968), which says:

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at p. 384.

Before viewing the mug-shot files Donna had described the appellant as having a "rough" complexion and tattoos on his biceps. Under cross-examination she strongly resisted the insinuation that her in-court identification was influenced by her having seen Summitt several times during pretrial court appearances. She said that she got a good look at him "right in the light at first when we went through that bar. We were in the light and I know that was him," and "I knew his face right away . . . I picked him right out of there." Although the particular photograph from which she identified him was not available at the trial, the detective was positive that it did not

show his arms. Counsel's cross-examination of both Donna and the detective was searching, tenacious and thoroughly competent to test the reliability of the identification. We find no error in the trial court's refusal to conduct a suppression hearing and no semblance of impermissible suggestiveness in the identification procedure.

The last claim of error relates to the following testimony elicited from the detective:

Q "Were you present at any time with the defendant after he had been placed under arrest?"

A "Yes, sir, I went with him to talk to him to try to determine if there was a second party involved."

Q "And did you advise him of his Miranda rights before you talked to him, or was he advised of his rights?"

A "Yes, sir, I advised him of his rights."

Q "Did he give a statement to you of any kind?"

A "No, sir, he did not."

As the appellant had not made any statement, there was of course no occasion to inquire whether he had been advised of his right to remain silent. Hence it might not be altogether unreasonable for one with a nasty mind to suspect that the prosecutor's design was to get it across to the jury that he did not deny his guilt. As it is, however, appellant's trial counsel must not have thought it hurt, because he did not voice any objection. In the absence of an objection or some other prompt request for relief there was no possible error on the part of the trial court.

Nevertheless, appellant contends that this alleged invasion of his Fifth Amendment protection was so egregious in view of the closeness of the case and the severity of the penalty that a reversal is mandatory anyway. We do not regard the evidence as all that close. The identification, for all that counsel may denigrate it, was positive and convincing. The witnesses referred to in the appellant's brief as having corroborated his testimony were not able to render much help. His story that his leg was in a cast broke down when the hospital bill indicated that the accident in which it was hurt happened on the

night of July 23-24, 1974, three days after the rape. Moreover, although we wish to discourage the type of questioning here under discussion, and to warn against its possible consequences, we are not ready to hold that in this particular instance it was all that bad. Certainly it was innocuous in comparison with the example in Niemeyer v. Commonweath, Ky., 533 SW 2d 218 (1976). The prosecuting attorney did not allude to it in his cross-examination of the appellant, nor did he mention it in his summation to the jury. There having been no objection, there was no error on the part of the trial court. If the interrogation invaded the appellant's Fifth-Amendment right of silence (which we do not decide), we find beyond a reasonable doubt that it was not prejudicial.

The judgment is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

TERRENCE R. FITZGERALD
Deputy Public Defender

DAVID M. LEWIS
Assistant District Defender
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

ROBERT F. STEPHENS
Attorney General

VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Opinion of the United States District Court for The Western District of Kentucky Rendered on May 31, 1978

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 78-0165-L(B)

JAMES WILLARD SUMMITT, PETITIONER

v.

DONALD BORDENKIRCHER, Warden Kentucky State Penitentiary, RESPONDENT

MEMORANDUM

This is a petition for a writ of heabeas corpus pursuant to Title 28 U.S.C. Section 2254.

In May, 1976, a Jefferson Circuit Court Jury convicted petitioner of rape. He was sentenced to life imprisonment and his conviction was affirmed by the Supreme Court of Kentucky. *Summitt* v. *Commonwealth*, Ky., 550 S.W.2d 448 (1977).

Petitioner's conviction rested on the uncorroborated testimony of the prosecuting witness. She identified him as her assailant from Police "mug shots." At the trial petitioner moved to suppress the in-court identification, asserting that the mug shot identification was impermissibly suggestive. The motion to suppress was denied, as was a motion for a hearing on the identification issue.

The prosecuting witness identified the petitioner after viewing about 1200 photographs at Jefferson County Police Headquarters. Her testimony and the testimony of Detective Sanders, the investigating officer, withstood vigorous and extensive cross-examination on the possible suggestive nature of the identification procedure. Both the prosecuting witness and Sanders were adamant in

their assertion that the prosecuting witness had identified petitioner without any suggestion from Sanders.

Petitioner urges that *Simmons* v. *U.S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), mandates that the writ be granted. Petitioner quotes out of context a portion of the Court's opinion. Apparently in transcribing from the opinion, one line was omitted, and the Court finds that the omission of that line produces a different effect than was intended by the Court. In *Simmons* the Supreme Court said:

> "We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a *very substantial likelihood of irreparable* misidentification."

The emphasized language quoted above was omitted from the petitioner's brief.

Petitioner also seeks comfort from *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In *Neil*, the Court adhered to its holding that if the totality of the circumstances indicated that the identification was reliable, suggestive confrontation procedures would not render the identification constitutionally invalid.

In the case before this Court the prosecuting witness was in the presence of the petitioner for about 45 minutes. She had ample opportunity to observe his physical characteristics and her description to the police included the observation that petitioner had tattoos on both arms. Petitioner, in fact, has tattoos.

Given the totality of the circumstances, the Court cannot find that the identification procedure violated any constitutional guarantees, and the refusal of the trial court to grant an evidentiary hearing was not erroneous.

Petitioner's second argument is that two questions and answers impermissibly commented on his silence. The testimony was as follows:

> "18 And did you advise him of his Miranda rights before you talked to him, or was he advised of his rights?
>
> A Yes, sir, I advised him of his rights.
>
> 19 Did he give a statement to you of any kind?
>
> A No, sir, he did not." (TE p. 55).

No objection was made to this testimony and the Court finds that Wainwright v. Sykes, —— U.S. ——, 97 S.Ct. 2497 (1977), is dispositive of this position. There, the Supreme Court said:

> "We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that petitioner's confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). We thus come to the crux of this case. Shall the rule of *Francis* v. *Henderson*, supra, barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? (Footnote omitted). We answer that question in the affirmative."

The Court finds that the failure to avail himself of an independent and adequate state procedural ground prevents direct review here.

An Order has been entered this date denying the petition for writ of habeas corpus.

This 31st day of May, 1978.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Petitioner
Counsel of record

Judgment of the United States District Court for The Western District of Kentucky Entered on May 31, 1978

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 78-0165-L(B)

JAMES WILLARD SUMMITT, PETITIONER

v.

DONALD BORDENKIRCHER, Warden Kentucky State Penitentiary, RESPONDENT

ORDER

For the reasons set forth in the Memorandum filed this date,

It is ORDERED that the Petition for Writ of Habeas Corpus be and it hereby is denied.

There is no just reason for delay, and this is a final and appealable Order.

This 31st day of May, 1978.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:

Counsel of record
Petitioner

Judgment of The United States Court of Appeals
for the Sixth Circuit
Entered on October 19, 1979

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-3415

JAMES WILLARD SUMMITT, PETITIONER-APPELLANT

v.

DONALD E. BORDENKIRCHER, WARDEN KENTUCKY STATE PENITENTIARY, RESPONDENT-APPELLEE

Before: LIVELY and MERRITT, Circuit Judges, and BROWN, District Judge.

JUDGMENT—Filed Oct. 19, 1979

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ [Illegible]
[Illegible]
Clerk

SUPREME COURT OF THE UNITED STATES

No. 79-5949

JOHN GREGORY WATKINS, PETITIONER

v.

DONALD E. BORDENKIRCHER, WARDEN

ON PETITION FOR WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted and the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition. The case is consolidated with No. 79-5951, *Summitt* v. *Bordenkircher*, and a total of one hour is allotted for oral argument.

March 17, 1980

SUPREME COURT OF THE UNITED STATES

No. 79-5951

JAMES WILLARD SUMMITT, PETITIONER

v.

DONALD E. BORDENKIRCHER, WARDEN

ON PETITION FOR WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and the petition for writ of certiorari be, and the same is hereby, granted. The case is consolidated with No. 79-5949, *Watkins* v. *Bordenkircher*, and a total of one hour is allotted for oral argument.

March 17, 1980

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IN THE

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V.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STEVEN L. BESHEAR
ATTORNEY GENERAL

VICTOR FOX
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-5949

JOHN GREGORY WATKINS — PETITIONER

V.

DONALD E. BORDENKIRCHER, WARDEN — RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent, by counsel, respectfully requests this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 608 F.2d 247.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A STATE TRIAL COURT TO DETERMINE THE RELIABILITY OF IDENTIFICATION EVIDENCE IN AN IN CAMERA HEARING?

II. DID CLOSING ARGUMENT OF THE PROSECUTOR DEPRIVE PETITIONER OF A FAIR AND IMPARTIAL TRIAL?

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections, if necessary, will be set out in the arguments which follow.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE ALLEGEDLY CONFLICTING DECISIONS ARE DISTINGUISHABLE ON THE LAW.

The petitioner asks that his petition be granted because of an alleged conflict between the various circuit courts of appeal. The case of United States v. Driber, 546 F.2d 18 (3rd Cir. 1976) and the authority relied on therein was based on the supervisory power and not on the requirements of due process. There is no conflict between the circuit courts of appeal nor can petitioner show an actual conflict.

The court below considered and relied on the decisions in Simmons v. United States, 390 U.S. 377 (1968), Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Brathwaite, 432 U.S. 98 (1977). Petitioner has not shown that the decision below is contrary to the Court's position in these cases.

II. ONLY A QUESTION OF EVIDENCE AND FACTUAL FINDINGS IS INVOLVED AND THE ISSUE IS NOT IMPORTANT ENOUGH TO WARRANT REVIEW.

The court below, while finding the prosecutor's remarks improper, concluded that the prosecutor's remarks were not so pervasive nor so prejudicial as to deny due process. The district court in its memorandum opinion stated "...the petitioner has not met his burden of showing that the remarks of the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Appendix p. 16).

The evidence of the case and the factual findings form the basis of the opinion below. It is manifest from this that the petition does not present a substantial federal question.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
ATTORNEY GENERAL

Victor Fox

VICTOR FOX
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS,

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DONALD E. BORDENKIRCHER, WARDEN,

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and

JAMES WILLARD SUMMITT,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

FRANK W. HEFT, JR.
Chief Appellate Defender of the Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioners

DANIEL T. GOYETTE
Chief Deputy Public Defender of the Jefferson District Public Defender
Of Counsel

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

INDEX

Page

TABLE OF AUTHORITIES i
OPINIONS BELOW 1
JURISDICTION 2
QUESTION PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 3
SUMMARY OF ARGUMENT 8
ARGUMENT
CONSTITUTIONAL DUE PROCESS OF LAW REQUIRES A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE 15
CONCLUSION 47

TABLE OF AUTHORITIES

Cases:

Allen v. Estelle,
568 F.2d 1108 (5th Cir. 1978) 23,37

Clemons v. United States,
133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), *cert. denied,* 394 U.S. 964 (1969) 35

Foster v. California,
394 U.S. 441 (1969) 20

Frank v. Blackburn,
605 F.2d 910, (5th Cir.) 23,37

Gilbert v. California,
388 U.S. 293 (1967) 18,19,22,36

Haskins v. United States,
433 F.2d 836, (10 Cir. 1970) 36

Hill v. Wyrick,
570 F.2d 748 (8th Cir. 1978) 37,44

Jackson v. Denno,
378 U.S. 368 (1964) ..... *passim*

Kirby v. Illinois,
406 U.S. 682 (1972) 17,29

Manson v. Brathwaite,
432 U.S. 98 (1977)..... 21,29,32,45

Neil v. Biggers,
409 U.S. 188 (1972) 20,21,29,45

Pointer v. Texas,
380 U.S. 400 (1965) 25,27

Pinto v. Pearce,
389 U.S. 31 (1967)..... 31,32,34,35

Powell v. Alabama,
287 U.S. 45 (1932)..... 26

Raggazzni v. Brierley,
321 F. Supp. 440 (W.D. Pa. 1970) 37

Rudd v. Florida,
343 F. Supp. 212 (M.D. Fla. 1972)..... 37

Simmons v. United States,
390 U.S. 377 (1968) 19,20,37

Stein v. New York,
346 U.S. 156 (1953) 30

Stovall v. Denno,
388 U.S. 293 (1967) 18,21,28,37

Summitt v. Bordenkircher,
608 F.2d 247 (6th Cir. 1979) ..... *passim*

Summit v. Commonwealth,
Ky., 550 S.W.2d 548 (1977) 2

Taylor v. Swenson,
458 F.2d 593 (8th Cir. 1972)..... 37

Townsend v. Sain,
372 U.S. 293 (1962) 31,35

United States ex rel. Choice v. Brierley,
460 F.2d 68 (3rd Cir. 1972) 37

United States ex rel. Fisher v. Driber,
546 F.2d 18 (3rd Cir. 1976)..... 35,43,44

United States ex rel. Phipps v. Follette,
428 F.2d 912 (2d Cir), *cert. denied,* 400 U.S. 908 (1970)..... 36

United States v. Allison,
414 F.2d 407 (9th Cir.), *cert. denied,* 396 U.S. 968 (1969) 35

United States v. Ash,
413 U.S. 300 (1973) 17

United States v. Broadhead,
413 F.2d 1351, (7th Cir. 1969), *cert. denied,* 396 U.S. 1017, (1970)..... 36

United States v. Cranson,
453 F.2d 123 (4th Cir. 1971), *cert. denied,* 406 U.S. 909 (1972).....36

United States v. Eatherton,
519 F.2d 603 (1st Cir. 1975) 44

United States v. Henderson,
489 F.2d 802 (5th Cir. 1973).....37

United States v. Hurt,
476 F.2d 1164 (D.C. Cir. 1973) 37

United States v. Mitchell,
540 F.2d 1163 (3rd Cir. 1976).....36

United States v. Ranciglio,
429 F.2d 230 (8th Cir.), *cert. denied,* 400 U.S. 959 36

United States v. Smith,
546 F.2d 1275 (5th Cir. 1977).....37

United States v. Sutherland,
428 F.2d 1152 (5th Cir. 1979), *cert. denied,* 409 U.S. 1078 (1972) 36

United States v. Wade,
388 U.S. 218 (1967) ..... *passim*

United States v. Wingard,
522 F.2d 796 (4th Cir. 1975) 44

Watkins v. Bordenkircher,
608 F.2d 247 (6th Cir. 1979) ..... *passim*

Watkins v. Commonwealth,
Ky., 565 S.W.2d 639 (1978) 1

Wong Sun v. United States,
371 U.S. 471 (1963) 18

Other Authorities:

Borchard, Convicting the Innocent (1932) 15

Frank and Frank, Not Guilty (1957) 15

Frankfurter, The Case of Sacco and Vanzetti (1927) 15

Sobel, Eyewitness Identification, Legal and Practical Problems (1972) 15

Wall, The Eyewitness Identification in Criminal Cases (1965) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS,

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and

JAMES WILLARD SUMMITT,

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DONALD E. BORDENKIRCHER, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Supreme Court of Kentucky published separate opinions for each petitioner. The opinions are reported in *Watkins v. Commonwealth,* Ky., 565 S.W.2d 630 (1978) (Appendix, hereinafter designated App., pp. 35Z-37) and

Summitt v. Commonwealth, Ky., 550 S.W.2d 548 (1977) (App., pp. 112-116). In each petitioner's case the opinion of the United States District Court for the Western District of Kentucky is not reported (App., pp. 38-45, 117-120). The United States Court of Appeals for the Sixth Circuit consolidated each petitioner's case and its opinion is reported as *Summitt and Watkins v. Bordenkircher,* 608 F.2d 247 (6th Cir. 1979) (App., pp. 47-58).

JURISDICTION

In each case the order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 (App., pp. 59, 122). The petitions for writs of certiorari were granted on March 17, 1980 (App., pp. 123-124). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. No. 79-5949 - WATKINS V. BORDENKIRCHER

The petitioner, John Gregory Watkins, was indicted by the March, 1975 term of the Jefferson County Grand Jury on one count of armed robbery and one count of first degree assault

(Transcript of Record 153965 at p. 2, hereinafter referred to as TR 153965). The January 1977 term of the Jefferson County Grand Jury returned another indictment charging Watkins with one count of bail jumping (Transcript of Record 158242 at p. 2, hereinafter referred to as TR 158242). On June 20 and 21, 1977, the cases were jointly tried before a jury.

The evidence for the prosecution tended to establish that on January 11, 1975, at approximately 11:30 p.m., an attempted robbery occurred at the Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith, an employee and part-owner, and Donald L. Goeing, Sr. were working in the store when three or four black males entered the store (App., p. 7). Smith testified that one of them approached the counter, asked for a pack of cigarettes and, when Smith turned around, said "this is a hold up." (App., pp. 7, 18). Goeing was refilling the soda machine at this time, and when the assailant saw some movement in that direction he stated: "I said don't reach for anything" and fired two shots at Goeing (App., p. 9, 18). One shot hit Goeing in the arm and the other went through the right ventricle of his heart (App., p. 18). Goeing was hospitalized for twelve days and recovered after a three and a half month convalescence (App., p. 18).

The evidence against Watkins was based solely on identifications made by Smith and Goeing (App., pp. 7, 18). Defense counsel submitted a written pretrial motion for a suppression hearing on the identification testimony (App., pp. 3-4). Before any evidence was heard at trial, this motion was reasserted in court, out of the presence of the jury, and was overruled (App., p. 6). During Smith's testimony and prior to Goeing's testimony, defense counsel objected to not being allowed an *in chambers* hearing, since it forced him to

explore the circumstances of the line-up and show-up in the presence of the jury (App., p. 8). Repeated defense motions for a mistrial on the same basis were overruled (App., pp. 8, 24, 30). The trial court also overruled defense counsel's motion for a mistrial based on the admission of the identification testimony (App., p. 30). A review of the identification testimony at trial follows.

Smith gave a description to the police on the evening of January 11, 1975, which described the assailant as a light-skinned, black male, thirty-five years old, approximately five feet, nine inches tall (App., pp. 5, 11-13). The initial police report described the person shooting the gun as wearing a dark hat, light colored, slip-over shirt and being armed with a black steel snugnose (sic) revolver (App., p. 5). This report was admitted into evidence as Defense Exhibit Two (App., pp. 28-29). According to his testimony, Goeing saw his assailant for about five seconds before he lost consciousness (App., p. 20). On the day of his arrest, Watkins was placed in a three man lineup with two dark-skinned black males and was identified by Smith (App., pp. 14-16). Smith testified that at the time he made the identification he "wasn't completely sure" but later on, when he "got himself together," he was sure (App., p. 16). Watkins was then taken to the hospital in the custody of two police officers to be viewed by Goeing in his hospital bed. Goeing had been informed that the police were "going to let him see someone that he could identify." (App., pp. 22-23). Goeing testified that at the time of his identification, he stated; "[I]t could have been close enough that it could have been his twin brother, it could have been somebody else." (App., p. 23). Goeing stated at trial that he had seen Watkins several times in court since his initial identification. (App., p. 23). No other arrests were made in the case,

and no photographs or other possible suspects were shown to Smith and Goeing (Transcript of Evidence, hereinafter TE, pp. 71, 74).

Watkins took the stand in his own behalf and testified that he had not been involved in the crime (App., p. 31). Watkins stated that on the evening in question he had played pool with David English and Gerald Redman. He then spent the remainder of the night with English, who was his cousin (App., pp. 31-32). Watkins' whereabouts were confirmed by the testimony of David English and Gerald Redman (TE pp. 99-113). Anthony Dove was also called by the defense and testified that he was in the Thoroughbred Liquor Store on the evening of January 11, 1975, and that Watkins was not the man who shot Donald Goeing, Sr. (TE pp. 116-117).

At the conclusion of its deliberation, the jury returned a verdict of guilty on all counts and recommended the maximum sentence of twenty (20) years on the robbery and assault charges (TE pp. 180-181). Sentence was imposed accordingly (App., pp. 33-34).

B. No. 79-5951 SUMMITT V. BORDENKIRCHER

The petitioner, James Willard Summitt, was indicted in the Jefferson Circuit Court on September 19, 1974, for the rape of Donna Jean Furgason (Transcript of Record, hereinafter referred to as TR 2). The same day Summitt waived arraignment and entered a plea of not guilty to the offense charged (TR 3). On May 17 and 18, 1976, a trial on the merits was held.

The evidence for the prosecution tended to establish that sometime between 11:30 p.m. on July 20 and 1:30 a.m. on July 21, 1974, the prosecutrix was forced out of her car and

into another vehicle (App., p. 71). She was driven to another location where she was raped, and was then returned to her car (App., pp. 72-73, 78-83). The next afternoon, after a discussion with her stepfather, the prosecutrix reported the rape to the police (App., pp. 74, 86). On the evening of July 21, 1974, and again on July 23, 1974, the prosecutrix and her stepfather viewed police photographs in an attempt to identify her assailant (App., pp. 63, 66-67, 88-90, 92). On the second date, she identified a photograph of Summitt as her assailant (App., pp. 90-91). Although the photograph was requested by defense counsel, it was not produced at trial (App., p. 106). Therefore, it is impossible to determine whether the prosecutrix identified Summitt at her first opportunity and whether her photographic identification was made under highly suggestive circumstances. Although there was no formal lineup identification, Summitt was seen by his accuser in court on at least two occasions before the trial (App., pp. 95-96).

On the day of trial, prior to the time the first witness took the stand, a motion was made to suppress any in-court identification of Summitt (App., p. 60). The motion was overruled (App., p. 60). Defense counsel then unsuccessfully asked for a suppression hearing on the identification issue (App., p. 60). The prosecutrix was the only witness who testified concerning the rape. There was no corroborating testimony introduced by other eyewitnesses, nor any medical or scientific evidence introduced in support of her claim. Moreover, Summitt testified in his own defense that he was elsewhere at the time of the crime. Nevertheless, after hearing the evidence, the jury returned a verdict of guilty and a sentence of life imprisonment was imposed in accordance with the jury's recommendation (App., p. 111).

SUMMARY OF THE ARGUMENT

I.

Eyewitness identification has been recognized as one of the most tenuous forms of evidence. The miscarriages of justice resulting from mistaken identification have received attention from the courts and commentators alike. It is within this framework that this Court in recent years has focused a number of its decisions on the constitutional underpinnings of eyewitness identification procedures. To protect those accused of crimes from misidentification, the court began to formulate constitutionally acceptable guidelines for the admissibility of identification evidence.

The first decisions dealing with pretrial identification procedures found that an accused has the right to have counsel present at a post-indictment lineup. If the lineup was conducted in the absence of counsel, the out-of-court identification procedure was constitutionally invalid and the admission of the in-court identifications, without first determining that they were not tainted by the illegal lineup but were of independent origin, was constitutional error.

Subsequently, a new test was developed. Courts were to consider the totality of the circumstances surrounding an identification procedure, to determine whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification, that an accused was denied due process of law. This standard was later revised by the addition of a requirement that suggestive identification procedures had to be conducive to a very substantial likelihood of irreparable misidentification before a denial of constitutional due process of law would be found to exist.

The standard presently governing the admissibility of

identification evidence is whether the identification, under the totality of the circumstances, was reliable even though the confrontation procedure was suggestive. The factors supporting the reliability of the identification must be weighed against the corrupting effect of the suggestive identification confrontation. In light of the present standard for the admission of identification evidence, the question becomes - how does constitutional due process of law require the reliability of an identification to be weighed against the corrupting effect of the identification confrontation?

Although current case law emphasizes the reliability of the identification, the constitutional questions underlying the admissibility of the identification must be answered before the reliability of the identification can be considered. A hearing out of the presence of the jury is required by due process of law to enable the trial court to decide the questions of law emanating from the constitutional implications of identification evidence. While the reliability of the identification is a question of fact for the jury to decide, the failure to conduct a hearing out of the presence of the jury regarding the admissibility of identification evidence necessarily results in a jury not only deciding the questions of fact but also permits the jury to decide a question of law. Since the constitutional issues surrounding the admissibility of identification evidence must be resolved before the reliability of the identification may even be considered, due process of law requires the trial court to hear all of the identification evidence outside the presence of the jury. After deciding the legal issues involved, the court must weigh the factors supporting the reliability against the corrupting effect of the suggestive identification procedure. Such a hearing would thus maintain the distinctions between

the trial court and the jury and is warranted because the questions of law and facts surrounding identification evidence are intricately interwoven.

II.

A hearing out of the presence of the jury on the admissibility of identification evidence is also required to assure the accused that his Sixth Amendment right to the effective assistance of counsel is not abridged. Cross-examination is not a constitutionally acceptable alternative to a pretrial hearing out of the presence of the jury on the admissibility of identification evidence. An attorney's attempt to expose on cross-examination the weaknesses and pitfalls of an eyewitness' identification, forces the attorney to gamble his client's right to a fair trial on the answers of the witness. Inquiry on cross-examination into the circumstances surrounding a witness' identification, without knowing the basis of the identifications and the factors which contribute to the identification hardly comport with a defendant's Sixth Amendment right to the effective assistance of counsel.

In the absence of a hearing out of the presence of the jury on the admissibility of identification evidence, there is a two-pronged dilemma confronting an attorney. First, he could underscore the reliability of the identification by his cross-examination. Second, if he does not know the base for a witness identification, he may be reluctant to explore that area on cross-examination and may thus bypass an opportunity to adequately challenge the identification. In either situation the defendant would be denied effective assistance of counsel.

Furthermore, if the assistance of counsel is necessary to protect the constitutional rights of an accused at a "critical stage" identification procedure, then the logical extension of that rule would require the assistance of counsel to explore the base for the identification and to demonstrate unconstitutional identification procedures at a hearing outside the presence of the jury. This conclusion applies even under the current standards governing the admissibility of identification evidence.

The argument that a hearing out of the presence of the jury on the admissibility of identification evidence is even more compelling when the accused has been subjected to an identification procedure at which the Sixth Amendment right to counsel does not attach. To leave trial counsel no other alternative but to attack on cross-examination a witness' identification and the confrontation procedures upon which the identification is based, could often result in a denial of the accused's right to the effective assistance of counsel.

III.

The court's prior decisions in the area of the admissibility of a defendant's confessions provides a conceptual framework from which the constitutionality of requiring a hearing out of the jury's presence on the admissibility of identification evidence can be analyzed.

This court has previously recognized that the initial determination of the voluntariness of the confession involved questions of law which are properly considered by the trial judge outside the presence of the jury. Likewise, in determining the admissibility factors against the corruptive effect of the suggestive identification itself, the trial court must first determine the legal issues underlying the identifi-

cation procedure before allowing the question of reliability to reach the jury for its consideration. If the present balancing test governing the admissibility of identification evidence is left entirely up to the jury, then it will be impossible for a reviewing court to determine whether or not the admissibility of the identification comports with due process of law. A hearing conducted out of the presence of the jury on the admissibility of identification evidence is necessary to effecuate the guarantee of a fair trial consonant with due process of law.

IV.

The United States Court of Appeals for the Sixth Circuit erroneously concluded that due process of law did not require a hearing out of the presence of the jury on the admissibiity of identification evidence. The Sixth Circuit's decision is based upon an erroneous interpretation of prior decisions of this Court and is in conflict with decisions from other circuit courts of appeal.

(A)

As will be demonstrated in the brief, the evidence in petitioner Watkins' case indicates various factors which should be reviewed by the trial court, in a hearing outside the presence of the jury, to determine the existence of possible taint of the identification and whether or not the identification should have been admitted into evidence.

(B)

In petitioner Summitt's case, the only evidence of rape was the testimony of the prosecuting witness who made an in-court identification and an out-of-court identification based upon her review of some photographs. None of the photographs were produced before or at trial. Such circumstances as these also require that a hearing be conducted out of the presence of the jury to determine the admissibility of the identification evidence. The failure to conduct such a hearing made it impossible for defense counsel to know whether the prosecuting witness became aware of the petitioner's physical characteristics at the time of the rape or while viewing the photographs or from seeing the petitioner several times in court.

V.

The Sixth Circuit Court of Appeals found that the state trial court had before it all of the facts concerning the reliability of the identification evidence. The Sixth Circuit, accordingly, concluded that the petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence. Therefore, no denial of due process occurred.

The petitioners sumit that they were not given an adequate hearing or an independent determination of the reliability of the identification evidence, because defense counsel was forced to explore the reliability of the identification solely through cross-examination. This places a defense counsel in an untenable position. While trying to challenge the reliability of the identification he runs the risk of causing

irreparable prejudice to the accused by unavoidably bolstering the in-court identification through cross-examination. Indeed, the dissenting opinion in the Sixth Circuit recognized this dilemma and found that hearings out of the presence of the jury were required because of the serious question concerning the reliability of the courtroom identifications of the petitioners.

The decision of the Sixth Circuit is in direct conflict with decisions of other courts of appeal which hold that a trial court is required to conduct a hearing out of the presence of the jury to determine the admissibility of identification evidence. Some jurisdictions require a showing that a motion for such a hearing is not frivolous or require a showing of the impermissible suggestiveness of the identification procedures. However, the petitioners submit that such a requirement necessitates a hearing to determine the merits of a defendant's challenge to the identification procedures. Moreover, even if factors and standards were enunciated to give trial courts some guidance as to when a hearing was required out of the presence of the jury on the admissibility of identification evidence, the standards and factors themselves would have to be interpreted and applied on a case-by-case basis. Thus, a ruling that such a hearing is constitutionally required would not only comport with the due process considerations underlying the admissibility of identification evidence, but would also promote judicial economy by the existence of a more thorough record which would facilitate appellate review. The petitioners submit that the attempts of the reviewing courts below to determine the reliability of the identifications retrospectively is not an adequate or a reliabile substitute for a suppression hearing conducted at trial.

The petitioners have demonstrated that a hearing out of

the presence of the jury on the admissibility of identification evidence is constitutionally required to safeguard their rights guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution. Accordingly, the convictions should be reversed.

ARGUMENT

CONSTITUTIONAL DUE PROCESS OF LAW REQUIRES A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE.

I.

The problems posed by eyewitness identification in criminal cases have been the subject of much study by commentators.[1] Indeed, it has been noted that "[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined." Wall, Eyewitness Identification in Criminal Cases 26 (1965). The con-

[1]See for example Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957); Frankfurter, The Case of Sacco and Vanzetti (1927); Sobel, Eyewitness Identification, Legal and Practical Problems (1972); Wall, Eyewitness Identification in Criminal Cases (1965).

stitutional dimensions of eyewitness identification have been the focal point of numerous decisions of this Court in recent years. They have come to the fore as a result of suggestive identification procedures deliberately or inadvertently utilized by law enforcement authorities. In *United States v. Wade,* 388 U.S. 218 (1967) it was observed that "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. *Id.* at 228. The *Wade* court recognized both the practical and legal problems inherent in eyewitness identification:

> But the confrontation compelled by the state between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. The vagaries of eyewitness identifications are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent - not due to the brutalities of ancient criminal procedures." The case of Sacco and Vanzetti 30 (1927) *Id.* at 228.

Thus, it was recognized that identification confrontation is fraught with the danger of suggestibility. *Id.* at 235.

The *Wade* court was also cognizant of the true significance of pretrial identification confrontations. "[I]t is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his

word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." *Id.* at 229.[2] The foregoing observation led the court to conclude that:

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness - "that's the man." *Id.* at 235.

It was with those considerations in mind that the court began to formulate constitutionally acceptable guidelines for the admissibility of identification evidence.

The *Wade* decision extended the Sixth Amendment right to counsel to a post-indictment, pretrial lineup.[3] If a defendant was denied his right to have counsel present at such a lineup, then the lineup was constitutionally invalid. *Id.* at 236-237. The witness' in-court identification of the defendant would be excluded from evidence if it emanated from the illegal lineup unless the prosecution could establish

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[2]The same conclusion equally applies to showups, photographic displays and other types of identification procedures.

[3]In *Kirby v. Illinois,* 406 U.S. 682 (1972) the Court declined to extend the *Wade per se* exclusionary rule to identification testimony based upon a police station showup that occurred in the absence of counsel after a defendant had been arrested but before he had been indicted or otherwise formally charged. See also *United States v. Ash,* 413 U.S. 300 (1973) in which the Court held that a defendant had no right to have counsel present to represent him at a post-indictment photographic display, containing the defendant's photograph, conducted by the prosecution for the purpose of allowing a witness to attempt an identification of the offender.

by clear and convincing evidence that the in-court identification was based upon an "independent source" or based upon observations of the suspect other than the lineup identification. *Id.* at 239-240, 242.

Wade was the first case in a trilogy of decisions which implemented constitutional safeguards to govern identification procedures. In *Gilbert v. California,* 388 U.S. 263 (1967) the Court applied the *Wade* decision to the States as a matter of constitutional law. As in *Wade,* the *Gilbert* court found that a defendant was denied his Sixth Amendment right to counsel when the police conducted a lineup without notice to, and in the absence of, the defendant's attorney. Thus, such an out-of-court identification procedure was constitutionally invalid and "[t]he admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error." *Id.* at 272.[4]

The last decision in the trilogy was *Stovall v. Denno,* 388 U.S. 293 (1967) which added still another dimension to the *Wade* and *Gilbert* cases. In *Stovall* the petitioner challenged the admission of the victim's identification testimony. The basis of the challenge was two-fold. First, shortly after the crime, the petitioner had been confronted by the victim in a showup at the victim's hospital room in the absence of his counsel. Second, the petitioner argued that the showup was impermissibly suggestive primarily because he was the only

[4]*Gilbert* also enunciated a *per se* exclusionary rule concerning the in-court identification of the defendant by several persons who were not present at the robbery for which he was on trial, but who identified him at a lineup. The *per se* exclusion of their in-court identification was required because "[t]hat testimony is the direct result of the illegal lineup, come at by exploitation of [the primary] illegality." *Wong Sun v. United States,* 371 U.S. 471, 488. *Id.* at 272-273.

black person in the hospital room. After holding that the *Wade* and *Gilbert* decisions were not to be applied retroactively, the Court turned its attention to the constitutional due process implications of the identification procedure. The question which the Court considered was whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the petitioner was denied due process of law. In answering the question, the Court enunciated an additional standard of review. "[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Id.* at 302.

From the *Wade-Gilbert-Stovall* trilogy emanated the "independent origin" and "totality of the circumstances" tests which were to determine the admissibility of identification evidence and the constitutional safeguards with which identification procedures must be conducted in order to comport with due process of law.

The next opportunity which the Court had to deal with pretrial identification procedures was in *Simmons v. United States,* 390 U.S. 377 (1968). In *Simmons* the petitioner asserted that he was denied due process of law because his pretrial identification from photographs was, under the circumstances, so unnecessarily suggestive and conducive to misidentification. The court reviewed the identification procedure pursuant to the "totality of the circumstances" test enunciated in *Stovall* and applied the following standard to determine if a due process violation occurred:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photographs will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substnatial likelihood of irreparable misidentification. *Id.* at 390 U.S. 384.

To the *Stovall* test, *Simmons* added the requirement that the suggestive identification procedure had to be conducive to a *very substantial likelihood* of irreparable misidentification before a denial of constitutional due process of law would be found to exist (Emphasis Added). With the addition of the above-emphasized words, *Simmons* imposed a stricter standard than *Stovall* for the determination of unconstitutional identification procedures.[5]

The next significant development in the case law pertaining to identification procedures and the admissibility of identification evidence occurred in *Neil v. Biggers,* 409 U.S. 188 (1972). In *Neil* a rape suspect was identified by a victim in a showup confrontation. The Court reviewed its prior decisions dealing with the scope of the due process protection against the admission of evidence derived from suggestive identification procedures. The *Stovall* test was analyzed, as well as the *Simmons* test, which restated the standard enunciated in *Stovall.* As noted by the Court, "the primary evil to be avoided is a very substantial likelihood of irreparable misidentification." *Id.* at 409 U.S. 198, citing *Simmons v. United States, supra* at 384. Consequently, the Court concluded that the appropriate standard was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was

[5]Subsequent to the *Simmons* decision, the Court decided *Foster v. California,* 394 U.S. 441 (1969). *Foster* was found by the Court to be "a compelling example of unfair lineup procedures." *Id.* at 394 U.S. 442. It is interesting to note that the Court, although citing *Simmons* in the *Foster* decision, applied the *Stovall* standard, i.e. based on the totality of the circumstance the conduct of the identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law, in determining that the identification procedures constituted a denial of due process.

suggestive." *Neil v. Biggers, supra* at 199. The Court listed a number of factors that had to be considered in evaluating the likelihood of misidentification. *Id.* at 199. Thus, the *Neil* decision shifted the primary emphasis in identification evidence. The overriding concern had become the "reliability" of the identification itself. Nevertheless, the reliability of an identification had to be measured against impermissibly suggestive identification procedures which constituted a denial of due process of law.

The evolving standards relative to the admissibility of identification evidence were most recently examined in *Manson v. Brathwaite,* 432 U.S. 98 (1977). The Court's prior decisions in *Stovall v. Denno* and *Neil v. Biggers,* both *supra,* were extensively reviewed in *Manson* which had as its central issue "whether the Due Process Clause of the Fourteenth Amendment compels the exclusion in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. *Id.* at 99. The question was answered in the negative, based primarily on the decision in *Neil v. Biggers, supra.* Using *Neil* as its foundation, the *Manson* court found that "the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Id.* at 106. This result was reached by concluding "that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and Post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. . . Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114.

Thus, it can be observed that while the emphasis is on the

reliability of the identifications as determined by the factors set out in *Neil,* the reliability itself must be examined by the effects upon it of a constitutionally impermissible and suggestive pretrial identification procedure. Although the case law on the admissibility of identification evidence has undergone a significant shift in emphasis as a result of the evolving standards between the *Wade* and *Manson* decisions, inquiry must be made to determine if the reliability of the identification is untainted by a suggestive identification procedure or if it inherently emanated from the suggestive identification procedures. In light of the foregoing, the question becomes—how does constitutional due process of law require the reliability of the identification to be weighed against the corrupting effect of the suggestive identification itself?

While the current case law puts emphasis on the reliability of the identification, the constitutional underpinnings of the admissibility of identification evidence still constitute the threshold inquiry to be determined before the question of reliability can even be reached. The *Neil* and *Manson* decisions, with their emphasis on the reliability of the identification, have not vitiated the constitutional considerations of identification evidence that were espoused in *Wade, Gilbert, Stovall* and *Simmons.* Indeed, the constitutional question underlying the admissibility of such evidence, must be answered before the reliability of the identification can be considered.[6]

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[6]In *Allen v. Estelle,* 568 F.2d 1108 (5th Cir. 1978), it was held that the due process requirement takes two steps: "First, as a threshold inquiry, the Court must decide whether the identification procedure was unnecessarily suggestive. A finding of impermissible suggestiveness raises concern over the reliability of identification and triggers closer scrutiny by the Court to determine whether such a procedure created a substantial risk of misidentification. *Id.* at 1112. The Fifth Circuit in *Frank v. Blackburn,* 605 F.2d 910, 912 (5th Cir. 1979) cited the foregoing procedure with approval and cited the *Manson* and *Neil* decisions as the underlying authority for *Allen's* two-step due process requirement.

This Court has never explicitly ruled that due process of law requires a hearing out of the presence of the jury to determine the admissibility of identification evidence. However, the petitioners submit that the requirement of such a hearing is implicit within the principles enunciated by the decisions from *Wade* to *Manson* and is required to effectuate the constitutional safeguards to be utilized in identification procedures. The constitutional considerations are inherent, preliminary factors in determining the admissibility of identification evidence. Notwithstanding the shift of emphasis to reliability, the Court from *Wade* to *Manson* has indicated that the constitutional issues posed by identification evidence must still be resolved before such evidence can be admitted at trial.

Moreover, the constitutional implications of identification evidence are questions of law that must be determined by the trial court. Although the reliability of the identification is a question of fact for the jury to decide, the failure to conduct a hearing out of the presence of the jury regarding the admissibility of identification evidence, necessarily results in a jury not only deciding the question of fact but also permits the jury to decide a question of law. Such a result goes well beyond the province of the jury. As indicated above, all of this Court's decisions from *Wade* to *Manson* recognize that the constitutional questions involved in identification evidence must first be resolved before the reliability of the identification can be reached. Since the constitutional issues must be determined vis-a-vis the reliability of the identification, it is appropriate for the trial court to hear all of the identification evidence out of the presence of the jury and, after deciding the legal issues presented thereby, weigh the factors supporting the reliability against the "corrupting effect of the suggestive

identification itself." This procedure, of course, involves a determination of: 1) the constitutional issue - whether the identification procedure was suggestive, and 2) whether the reliability of the identification was irreparably tainted by the suggestive identification. After the trial court decides these questions of law, then the reliability of the identification becomes a question of fact to be resolved by the jury.

It is readily apparent that the questions of law and fact which are presented by identification evidence are intricately interwoven. If the trial court must determine the constitutional considerations espoused in the cases from *Wade* to *Manson,* then it necessarily follows that a hearing out of the presence of the jury is constitutionally required to resolve these questions of law before the jury can consider the factual aspects of the identification. The hearing, as a matter of course, would require the trial court to examine the factors underlying the reliability of the identification. Once the trial court has determined that the reliability of the identification stands on a constitutionally firm foundation, the overall factual issue of the reliability of the identification can be submitted to the jury for its consideration.

II.

The accused's Sixth Amendment right to the effective assistance of counsel is necessarily interwoven with the argument that due process of law requires a trial court to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence. Such a hearing is required in order to assure the accused that his right to the effective assistance of counsel is not abridged.

If a hearing on the admissibility of an identification is not held, the Court in *Wade* noted:

> The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself - realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. *United States v. Wade, supra* at 240-21.

Thus, the *Wade* court recognized not only that cross-examination at trial is not a constitutionally acceptable alternative to pretrial hearing on the admissibility of identification evidence, but also recognized the inherent dangers of blind cross-examination into the area of an eyewitness' identification.[7] The Court directly addressed the inadequacy of cross-examination in attacking suggestive identification procedures as follows:

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. State of Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. *Id.* at 235.

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[7]Trial counsel for petitioner Watkins recognized the danger of exploring a witness' identification on cross-examination without having had a pretrial hearing out of the jury's presence of the admissibility of identification evidence. (App., p. 8).

The inherent dangers posed by eyewitness identification and the variety of factors which affect the identification are more than adequately enumerated in *United States v. Wade, supra* at 228-229. An attorney's attempt to expose on cross-examination the weaknesses and pitfalls of an eyewitness' identification, forces the attorney to gamble his client's right to a fair trial on the answers of the witness. Inquiry on cross-examination into the circumstances surrounding a witness' identification without knowing the base of the identification and the factors which contribute to the identification hardly comports with a defendant's Sixth Amendment right to the effective assistance of counsel.[8]

In the absence of a hearing out of the presence of the jury to determine the constitutional underpinnings of identification evidence and how they are to be weighed vis-a-vis the reliability factors set out in *Neil* and *Manson,* trial counsel finds himself in a dilemma which seriously impedes his ability to provide his client with effective assistance of counsel. Trial counsel, with considerable justification, may be reluctant to explore the basis of a witness' identification with a searching cross-examination. He finds himself in a quandry about whether or not to ask particular questions of an identification witness on cross-examination. The dilemma with which trial counsel is confronted in such situations is two-pronged. First, he could do irreparable damage to his client's defense by blindly exploring the bases underlying a witness' identification. This is precisely the caveat esposed by the Court in *United States v. Wade, supra* at 240-241. Second, his failure to fully inquire about the circumstances surrounding a witness' identification may result in missing an opportunity to expose the weaknesses and flaws in the identification and thereby diminish the

[8]*Powell v. Alabama,* 287 U.S. 45, 53 (1932).

credibility of the identification. In either situation, it is impossible for trial counsel to render effective assistance of counsel to his client.

The failure to conduct a hearing out of the presence of the jury on the admissibility of identification evidence has the inevitable result of having a "chilling effect" on a defendant's constitutional right to fully confront and cross-examine the witnesses against him.[9] In the absence of such a hearing, counsel finds himself plagued throughout the trial with thoughts of whether or not he should ask particular questions of a particular witness regarding the witness' identification. Accordingly, the guarantee of a hearing out of the presence of the jury on the admissibility of identification evidence would appear to be a logical extension of a defendant's Sixth Amendment right to the effective assistance of counsel.

Indeed, the role and necessity of counsel at identification procedures weighed heavily in the *Wade-Gilbert-Stovall* trilogy. In *Wade* it was argued that the assistance of counsel was indispensable in protecting the defendant's right to a fair trial at which the witness could be meaningfully cross-examined. *United States v. Wade, supra* at 223-224. The *Wade* court found a post-indictment, pretrial lineup a "critical stage" of the prosecution to which the right to assistance of counsel attached. *Id.* at 236-237. The Court viewed the presence of counsel at critical stages to operate as an assurance "that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Id.* at 227. The assistance of counsel was necessary because "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive

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[9]*Pointer v. Texas,* 380 U.S. 400 (1965).

him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.* at 231-232. Thus, the constitutional implications of identification procedures required that an accused be able to exercise his right to the assistance of counsel and take advantage of the presence of counsel to protect him from unconstitutional identification procedures.

In *Stovall v. Denno, supra,* the Court re-iterated the rationale underlying the right to counsel which attached to post-indictment identification procedures by stating:

> We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great, both because of the manner in which confrontations are frequently conducted, and because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage," and that counsel is required at all confrontations. *Id.* at 298.

Thus, *Stovall* directly implied that a hearing was necessary at trial in order that counsel be able to demonstrate for the trial court any constitutional violations occurring at identification procedures. The right to a hearing on the admissibility of identification evidence necessarily follows from the accused's right to counsel at identification confrontations and is part and parcel of accused's Sixth Amendment right to counsel. If the assistance of counsel is necessary to protect the constitutional rights of an accused at a "critical stage" identification procedure, then the logical extension of that rule would require the assistance of counsel

to explore the basis for the identification and to demonstrate unconstitutional identification procedures at a hearing outside the presence of the jury. This conclusion applies even under the current standards governing the admissibility of identification evidence set forth in *Neil v. Biggers,* and *Manson v. Brathwaite,* both *supra,* since the constitutional implications of identification procedures must still be determined by weighing the reliability factors outlined in *Neil* against the corrupting effect of the suggestive identification procedures. *Manson v. Brathwaite, supra* at 114.

The right to counsel attaches only to those identification procedures which are deemed to be "critical stages" of the criminal justice system. *United States v. Wade*; *Kirby v. Illinois,* both *supra.* As indicated above, the *Wade* and *Stovall* decisions cogently set forth the necessity for counsel at "critical stage" identification procedures and how vital the assistance of counsel is at those procedures to fully protect an accused's right to a fair trial. The question therefore remains - if the identification occurs at a "non-critical stage," how can an accused be protected against the corruptive effects of a suggestive identification procedure without a hearing outside the presence of the jury? As demonstrated above, cross-examination is not always the most effective manner in which to attack the reliability of an identification and the confrontation procedures underlying the identification itself. Therefore, the argument that a hearing out of the presence of the jury on the admissibility of identification evidence is even more compelling when the accused has been subjected to an identification procedure at which the Sixth Amendment right to counsel does not attach. To leave trial counsel no other alternative but to attack on cross-examination a witness' identification and the con-

frontation procedures upon which the identification is based, could often result in a denial of the accused's right to the effective assistance of counsel. For these reasons, the constitutional right to a hearing out of the presence of the jury on the admissibility of identification evidence is a logical extension of the Sixth Amendment right to the effective assistance of counsel.

III.

It is also appropriate to analyze the constitutional necessity of a hearing outside the presence of the jury on the admissibility of identification evidence in light of this Court's decision in *Jackson v. Denno,* 378 U.S. 368, (1964).[10] It was held in *Jackson* that, "A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380. In *Jackson* the New York rule which was struck down by the court required that an issue to the jury. If the jury found the confession to be involuntary then it was to disregard it entirely, and determine guilt or innocence solely from the other evidence. If the jury found the confession to be voluntary, then it was to determine its truth or reliability and weigh it accordingly. *Id.* at 374-375. The Court found the New York procedure to be violative of the due process clause of the Fourteenth Amendment because it "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the

[10]*Stein v. New York,* 346 U.S. 156 (1953) was overruled in *Jackson v. Denno, supra* at 391.

trial," and "did not adequately protect Jackson's right to be free of a conviction upon a coerced confession. . ." *Id.* at 377. The Court found the constitutional violation to occur because:

> [T]he New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there indication of how the jury resolved disputes in the evidence concerning critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other. *Id.* at 379-380.

In *Pinto v. Pearce,* 389 U.S. 31 (1967), the Court reviewed the holding in *Jackson v. Denno, supra* that a defendant's constitutional rights are violated when this challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. The Court concluded that in light of *Jackson v. Denno, supra*:

> A confession by a defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found to be involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings out of the presence of the jury. *Pinto v. Pearce, supra* at 32.

The decisions in *Jackson v. Denno* and *Pinto v. Pearce,* both *supra,* thus establish a conceptual framework from which the constitutionality of requiring a hearing out of the jury's presence on the admissibility of identification evidence can be analyzed.[11]

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[11]It would appear that such a hearing is required at the state level under *Townsend v. Sain,* 372 U.S. 293 (1962) in order to determine the factual complex in which the challenged identification was made.

The rulings in *Jackson v. Denno* and *Pinto v. Pearce,* both *supra,* recognized that the initial determination of the voluntariness of the confession involved questions of law which are properly considered by the trial judge outside the presence of the jury. Likewise, in determining the admissibility of identification evidence by weighing the reliability factors against the corruptive effect of the suggestive identification itself,[12] the trial court must first determine the legal issues underlying the identification procedure before allowing the question of the reliability to reach the jury for its consideration (See Section I of petitioners' brief). The result in the case at bar should be the same as that reached in *Jackson v. Denno* and *Pinto v. Pearce,* both *supra* - the trial court must determine the questions of law and the jury must decide the question of fact.

The dangers of allowing a jury to determine both the voluntariness and the reliability of a defendant's confession, as well as guilt or innocence, prompted the court to inquire:

> If it finds the confession involuntary does the jury - indeed, can it - then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession. Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows that a defendant has given a truthful confession? *Jackson v. Denno, supra* at 388.

With some modifications, of course, the same questions are equally appropriate in examining what a jury considers about identification evidence which is admitted without conducting a hearing out of the jury's presence to determine

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[12]*Manson v. Brathwaite, supra* at 114.

the admissibility of the evidence. If the *Manson* balancing test for determining the admissibility of identification evidence is left entirely up to the jury for its resolution, then it will be impossible to determine how the jury measured the reliability factors against the corruptive effects of the suggestive identification. A reviewing court would be unable to assess the jury's conclusion, the factors it considered, and the weight given to those factors. These problems would be avoided if the trial judge made the initial determination concerning the constitutional underpinnings of identification evidence in a hearing outside the presence of the jury and submitted his findings of fact (necessary to resolve the constitutional questions raised by the challenge to identification evidence) and conclusions of law. Such a procedure would comport with the due process clause of the Fourteenth Amendment and maintain the integrity of the criminal justice system by having judges decide questions of law and having juries decide questions of fact.

IV.

It remains to be considered how the foregoing principles are applied by the courts in general and to the case at bar in particular.

Prior to their respective trials, the petitioners, by counsel, moved for hearings out of the presence of the jury to suppress identification evidence.[13] The requested hearings were not

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[13]App., pp. 6, 60. Counsel for petitioner Watkins also filed a written pretrial motion requesting a hearing outside the presence of the jury to determine the admissibility of the identification testimony. (App., pp. 3-4). In addition, he moved for a mistrial based upon the trial court's failure to conduct the requested hearing (App., pp. 29-30).

conducted and the prosecution's cases against the petitioners were based primarily on identification evidence. In both cases, the out-of-court and in-court identifications were admitted into evidence.

The Sixth Circuit Court of Appeals concluded in its opinion[14] in the petitioners' cases (App., pp. 47-58) that due process of law did not require a hearing outside the presence of the jury on the issue of the reliability of identification evidence (App., p. 52; 608 F.2d 251). The Sixth Circuit reached its result based upon its construction of *Jackson v. Denno* and *Pinto v. Pearce,* both *supra.*

> We conclude, then, that as applied to identification evidence, *Jackson v. Denno, supra* and *Pinto, supra,* only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process. App., p. 53; 608 F.2d 251.

The court did acknowledge that such a procedure is no doubt preferable because:

> An independent hearing on the admissibility of identification evidence, either before trial or at trial outside the presence of the jury, would remove the dissadvantage [sic] to defendant's counsel of investigating the propriety of the identification evidence in the

[14] *Summitt v. Bordenkircher,* 608 F.2d 247 (6th Cir. 1979).

> presence of the jury. In addition, it would protect the jury from being exposed to evidence that might subsequently be determined inadmissible. App., pp. 50-51; *Id.* at 608 F.2d 250.

The court obviously recognized that the dilemma considered by *United States v. Wade, supra,* at 240-241, results when trial counsel is forced to challenge identification evidence solely by means of cross-examination. The petitioners have demonstrated above that such a procedure does not comport with due process of law nor protect their right to the effective assistance of counsel (See Section II.). Furthermore, the petitioners respectfully submit that the Sixth Circuit's construction of *Jackson v. Denno* and *Pinto v. Pearce,* both *supra* is erroneous. (See petitioner's brief, Section III). Case law supports the petitioners' position with respect to the analogy presented by *Jackson v. Denno* and *Pinto v. Pearce,* both *supra.*

In *United States ex rel. Fisher v. Driber,* 546 F.2d 18 (3rd Cir. 1976), a case substantially similar to the case at bar, the court felt obligated to "follow the mandate of *Jackson v. Denno, supra* in determining that *Townsend v. Sain,* 372 U.S. 293, (1962), requires an evidentiary hearing at the state level to determine the factual complex in which the challenged identification was made." The court in *Driber* went on to say, at 546 F.2d 21:

> The conceptual basis of a *Jackson* hearing is to permit a defendant to explore his legal contentions without the constraints imposed by the presence of a jury. The state procedures here did not satisfy the salutary rule announced in *Clemons v. United States,* 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), *cert. denied,* 394 U.S. 964, (1969), and *United States v. Allison,* 414 F.2d 407 (9th Cir.), *cert. denied,* 396 U.S. 968, (1969). Judge McGowan set forth the test for the District of Columbia Circuit in *Clemons:*

> Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The Court should then, on facts elicited outside the presence of the jury, rule upon whether a pretrial identification by the same eyewitness is violative of due process.

408 F.2d at 1237.

A similar test was formulated for the Ninth Circuit by Judge (now Chief Judge) Browning in *Allison:*

> [W]here a timely and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identification procedures, it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained.

414 F.2d at 410. *Accord, United States v. Mitchell,* 540 F.2d 1163 (3d Cir. 1976). *See also United States ex rel. Phipps v. Follette,* 428 F.2d 912, 913 n. 1 (2d Cir.), *cert. denied,* 400 U.S. 908, (1970); *United States v. Cranson,* 453 F.2d 123, 125-126 (4th Cir. 1971), *cert. denied,* 406 U.S. 909, (1972); *United States v. Sutherland,* 428 F.2d 1152, 1155 (5th Cir. 1970), *cert. denied,* 409 U.S. 1078, (1972); *United States v. Broadhead,* 413 F.2d 1351, 1359 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017, (1970); *Haskins v. United States,* 433 F.2d 836, 838-839 (10th Cir. 1970). Cf. *United States v. Ranciglio,* 429 F.2d 228, 230 (8th Cir.), *cert. denied,* 400 U.S. 959 (1970).

Other decisions are in accordance with the foregoing authorities and find that the requirements for requiring a hearing out of the presence of the jury on the admissibility of identification evidence are grounded individually or collectively in *United States v. Wade, Gilbert v. California,*

Stovall v. Denno, and *Simmons v. United States,* all *supra.* See for example, *Allen v. Estelle, supra*; *Frank v. Blackburn, supra*; *United States v. Hurt,* 476 F.2d 1164 (D.C. Cir. 1973); *United States ex rel. Choice v. Brierley,* 460 F.2d 68 (3rd Cir. 1972); *United States v. Henderson,* 489 F.2d 802 (5th Cir. 1973); *Rudd v. Florida,* 343 F. Supp. 212 (M.D. Fla. 1972), aff'd 477 F.2d 805 (5th Cir. 1973); *Raggazzini v. Brierley,* 321 F. Supp. 440 (W.D. Pa. 1970); But see *Hill v. Wyrick,* 570 F.2d 748 (8th Cir. 1978); *Taylor v. Swenson,* 458 F.2d 593 (8th Cir. 1972); *United States v. Smith,* 546 F.2d 1275 (5th Cir. 1977).

The petitioners have indicated in Sections I, II, and III of the brief the constitutional considerations which require that a trial court conduct a hearing out of the presence of the jury on the admissibility of identification evidence. The foregoing case authority strongly supports the argument that such a hearing is a matter of constitutional right which stems from the Sixth Amendment right to the effective assistance of counsel and the due process clause of the Fourteenth Amendment. It remains to examine why the petitioners herein are entitled to a hearing out of the presence of the jury on the admissibility of identification evidence and how the denial of the hearing constituted irreparable prejudice to their rights to a fair trial.

(A)

Trial counsel for petitioner Watkins was well aware of the *Wade* dilemma of "bolstering the courtroom identification by bringing out and dwelling upon the prior identification during cross-examination of the prosecuting witness." *United States v. Wade, supra,* at 240. Indeed, defense

counsel objected strenuously to the necessity of using this technique and to the prejudice inherent in it (App., p. 8). However, despite his objections, he was forced to delve into the circumstances of the identifications in the presence of the jury.

The evidence in Watkins' case reveals various factors which should have been reviewed by the trial court to determine the existence of possible taint. A review of these factors follows.

(1) Neither of the eyewitnesses had much of an opportunity to view the assault. Walter Smith stated that he only saw the face of the man when he turned around from getting the man some cigarettes (App., pp. 9-10). The shots were immediately fired and the man ran out (App., pp. 9-10). It happened so quickly that Smith did not even have time to get the money out of the cash register (App., p. 9). Furthermore, Smith described the man as being about thirty-five years old, (App., pp. 5, 11-13) and Watkins was only seventeen at the time (App., p. 31). Goeing testified that he saw the man's face for about five seconds as he turned around from the soda machine. Shots were then fired, and he passed out (App., p. 20). Both witnesses stated that the assailant was a stranger and they had no reason to pay any particular attention to him (App., pp. 8, 19). He was just another customer until he stated that "this is a hold-up." The interval between the time this statement was made and the time the man ran out of the door was a matter of seconds. Thus, the opportunity for observation was minimal at best.

(2) The three man lineup was extremely suspect because it involved only one light-skinned, black male (App., pp. 15, 26-27). This was one of the few physical characteristics which Smith had described to police (App., pp. 5, 11-13). The fact that Smith was not sure of his identification at that

time, but became sure when he "got himself together," (App., p. 16) suggests that later in-court appearances with Watkins had the effect of strengthening his previously doubtful identification. The fact that he was not presented with any other possible suspects fitting the description, either by lineup or photograph, may have pressured Smith into identifying Watkins, particularly if he was aware of the fact that Goeing had identified Watkins as the man.

(3) The showup in the hospital was also suspect. The circumstances suggest that, when Goeing identified Watkins, he expected to see the man who had shot him. Goeing was aware that a man was being brought to his hospital bed in the custody of the police to be identified (App., pp. 22-23). He viewed no other suspects but Watkins, a young, light-skinned, black male, obviously suspected by the police. The circumstances of the identification were clearly suggestive and prejudicial. Goeing also expressed some doubt at the time of this identification. He said it was close enough that it could have been his twi brother, but it "could have been someone else." (App., p. 23). This doubt was predictably diminished with each court appearance or proceeding that involved Watkins as the criminal defendant. The District Court below provided an excellent overview of exactly the type of prejudice which confronted Watkins when it noted at App., p. 39.

> Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified by Goeing as the person who had fired the shots, and that this identification was reinforced in Goeing's mind by having seen petitioner several times while awaiting the

> call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a lineup two days after the robbery and there was shown three or four black males. He identified the petitioner at the lineup, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later on said that after he got himself together, he knew that petitioner was the man.

The District Court relied heavily on the extensive cross-examination of the prosecution's witnesses to reaffirm the lack of suggestiveness of the identification.[15] However, since Watkins' counsel was aware of the problem, there was necessarily an element of restraint involved which precluded a thorough examination. Watkins' counsel felt restricted by the inherent prejudice of blind cross-examination. Thus, he was put in the untenable position of trying to protect Watkins as much as possible from the introduction of prejudicial, perhaps inadmissible evidence, while at the same time seeking to discover facts about an identification of which he had no prior knowledge. Regardless of the guarded nature of the cross-examination, it unavoidably resulted in the same type of bolstering which *Wade* condemns and which could have been avoided if a suppression hearing had been held.

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[15]The Sixth Circuit found that the hospital showup did reflect an element of uncertainty on Goeing's identification but concluded, under the totality of the circumstances, that the showup identification was not so unreliable as to create a substantial likelihood of misidentification. The Court recognized that the lineup presented a very close question, but again concluded that under the totality of the circumstances there was no substantial likelihood of misidentification. App., pp. 55-56, 608 F.2d 252-253.

(B)

In the case of petitioner Summitt, the prosecutrix identified him from a book of photographs two days after the occurence. However, the photograph in question was not produced by the Commonwealth either before or at trial (App., p. 106). Thus, prior to his cross-examination of the prosecutrix at trial, it was impossible for defense counsel to know whether she became aware of Summitt's physical characteristics at the time of the rape or whether she became aware of them for the first time in viewing the photograph. Moreover, defense counsel established on cross-examination that Summitt may have been viewed by the prosecutrix on at least two occasions at the courthouse prior to the trial, with only the prosecutor and a police officer in the room, and without benefit of counsel. This may have bolstered the prosecutrix' identification at trial (App., pp. 94-97, 99).

The obvious uncertainty of the identification was such that defense counsel could not afford to leave it unexplored. However, in the absence of a hearing, the only method available to him to uncover the taint and its prejudicial repercussions was a "fishing expedition" at trial. Lacking knowledge of the extent of the problem, he could not even intelligently object to the introduction of the evidence. Because defense counsel was unable to determine prior to trial the extent of the unfairness of the identification, he was put in the untenable position of trying by cross-examination of the prosecutrix "to discover and reveal the unfairness, while bolstering the courtroom identification by bringing out and dwelling upon the prior identification." *United States v. Wade, supra* at 240.

In disposing of this contention, the District court below noted at App., pp. 117-118:

> The prosecuting witness identified the petitioner after viewing about 1200 photographs at Jefferson County Police Headquarters. Her testimony and the testimony of Detective Sanders, the investigating officer, withstood vigorous and extensive cross-examination on the possible suggestive nature of the identification procedure. Both the prosecuting witness and Sanders were adamant in their assertion that the prosecuting witness had identified petitioner without any suggestion from Sanders.

As in petitioner Watkins' case, the District Court below relied heavily on the cross-examination of the prosecutrix and police officer to reaffirm the lack of suggestiveness of the identification.[16] However, this forced cross-examination resulted in the very type of bolstering which *Wade* condemns and which could have been avoided if a suppression hearing had been held. Indeed, because no hearing was held, defense counsel was forced to lead both the prosecutrix and the police officer into those adamant assertions which the District Court relies on in its opinion.

V.

In *Summitt and Watkins v. Bordenkircher,* 608 F.2d 247, 251 (6th Cir. 1979) the Court of Appeals concluded that:

> [A]s applied to identification evidence, *Jackson v. Denno, supra* and *Pinto, supra,* only require that the

[16]The Sixth Circuit placed emphasis on its finding that the photographic identification was neither suggestive nor unreliable and that under the circumstances there was no substantial likelihood of misidentification. App., p. 54; 608 F.2d 252.

> trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

Since defense counsel in the petitioners' cases were forced to explore the reliability of the identification on cross-examination in the presence of the jury, it cannot be found that such a procedure constituted an adequate hearing on the reliability and admissibility of the identification evidence. The utilization of such a procedure places defense counsel in precisely the untenable position envisioned in *United States v. Wade, supra.* While trying to challenge the reliability of the identification in the presence of the jury, defense counsel runs the inherent risk of causing irreparable prejudice to his client by unavoidably bolstering the courtroom identification through cross-examination. This is an inevitable result of the hearing deemed adequate by the Sixth Circuit in *Summitt v. Bordenkircher, supra.*

The Third Circuit's decision in *United States ex rel. Fisher v. Driber, supra,* is in direct conflict with the Sixth Circuit's decision in *Summitt v. Bordenkircher, supra.* Analogizing the principles enunciated in *Jackson v. Denno, supra* to *Fisher,* the Third Circuit concluded that a state trial court is constitutionally required to conduct a hearing out of the presence of the jury on the reliability and admissibility of identification evidence where the request for such a hearing

is not a frivolous one. The petitioners' cases present serious questions of identification. By denying an *in camera* hearing on the reliability of the identification evidence, the state trial court forced the issue to be resolved in the presence of the jury. Prejudice from such a procedure can be presumed by the length of the sentence imposed on each petitioner.

The Sixth Circuit took note of the *Driber* decision that due process requires that the trial court hold a hearing to determine the admissibility of identification evidence out of the presence of the jury if the requrest for a such a hearing is "not frivolous".[17] App., p. 53; *Summitt v. Bordenkircher, supra* at 608 F.2d 251, citing *United States ex rel. Fisher v. Driber,* at 546 F.2d 22. The Sixth Circuit then concluded, "we note, however, that in many cases it would be difficult, if not impossible, to determine whether the request was frivolous without holding the hearing."[18] App., p. 53;

[17]The dissenting opinion of Judge Merritt (App., p. 58; *Summitt v. Bordenkircher,* 608 F.2d 253-254) recognized the serious question concerning the reliability of the courtroom identifications of the petitioners. Accordingly, Judge Merritt would have followed the *Driber* ruling that due process requires a hearing out of the presence of the jury where serious identification questions are present. Judge Merritt, citing *United States v. Wade, supra,* also took note of the defense counsel's untenable position when he is forced to challenge identification evidence solely by cross-examination.

[18]Some jurisdictions require that a hearing be conducted out of the presence of the jury on the admissibility of identification evidence only when the circumstances of the identification warrant such an inquiry or only upon a showing of impermissible suggestiveness in the identification procedures. See for example, *Hill v. Wyrick, supra; United States v. Eatherton,* 519 F.2d 603 (1st Cir. 1975); *United States v. Wingard,* 522 F.2d 796 (4th Cir. 1975). The petitioners submit that the foregoing is an inappropriate standard by which a court should decide whether or not to conduct a hearing out of the presence of the jury on the admissibility of identification evidence. First, as a practical matter, a

(continued)

Summitt and Watkins v. Bordenkircher, supra at 608 F.2d 251.

Defense counsel in each case raised the issue of tainted identification by requesting a hearing at the outset of the trial (App. pp. 3-4, 6, 60). It was then incumbent upon the court to determine the reliability of the identification. To avoid compounding any impermissible suggestiveness, the court should have made the determination in a hearing out of the presence of the jury. Alternatively, the court should have recognized its duty to determine the reliability of the identification at trial by those factors set out in *Neil v. Biggers, supra.* In *Manson v. Brathwaite, supra,* the Court specifically enumerates the factors which must be considered when a challenge to a pretrial identification is raised, in order to determine whether it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The *Manson* court articulated these factors at 432 U.S. 114:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation,

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(footnote continued from preceding page)
hearing would be required to determine if there was merit to a defendant's assertion that the identification procedure constituted a denial of due process. Secondly, appellate courts would constantly be asked to determine if the facts surrounding a particular identification were adequate to entitle the defendant to a hearing out of the presence of the jury on the admissibility of identification evidence. Even if standards and factors were enunciated in an attempt to give guidance to trial courts as to when a hearing was constitutionally required, the standards and factors would virtually have to be interpreted and applied on a case-by-case basis. Thus, a blanket rule, holding that due process requires such hearings on motion, would promote judicial economy and a more thorough record which would facilitate appellate review.

> and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

The court in *Manson* then proceeds to analyze these factors individually, devoting a numbered paragraph to each, thus demonstrating the manner in which this analysis is to be conducted. There is less potential for prejudice to the defendant if these factors are considered in the setting of a suppression hearing. However, the fact that a hearing is not held does not obviate the necessity for a reliable determination of those factors. This determination must be made at the trial level to afford the defendant his right to effective assistance of counsel, as well as to insure his right to a fair trial.

By contrast, in the case of each petitioner, the reviewing courts below have attempted to determine the reliability of the identification *retrospectively.* Such a retrospective ruling can only hypothesize about questions which might have been asked, but were not because of the presence of the jury. Moreover, such a retrospective determination completely ignores the prejudice to the defendant which results from his being required to test the identification through blind cross-examination at trial. It is virtually impossible at the appellate level to determine what price the defendant has paid for his efforts to expose a suggestive identification. Consequently, post-conviction findings do not provide a reliable substitute for a suppression hearing at the trial.

The failure of the trial courts to grant a prior *in camera* hearing on the identification by the eyewitnesses prejudiced the petitioners in two ways. First, at the trial level, the lack of a hearing resulted in truncated cross-examination of the prosecution witnesses and the bolstering of their in-court identifications by defense counsel. Second, at the appellate

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level, it provided the viewing court with an incomplete record of the proceedings on which to predicate the finding of a lack of prejudice. Under the circumstances presented, nothing short of a contemporaneous hearing could have satisfied the petitioners' right to a fair trial consonant with due process of law. Because of the possibility of suggestiveness in the pretrial confrontations, the denial of a hearing out of the presence of the jury on the admissibility of identification evidence deprived the petitioners of a fair trial in accordance with due process of law and the right to effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petitioners, John Gregory Watkins and James Willard Summitt, respectfully submit that they are entitled to have their convictions reversed on the grounds delineated above.

/s/ Daniel T. Goyette
DANIEL T. GOYETTE
Chief Deputy Public Defender of the Jefferson District Public Defender
Of Counsel

/s/ Frank W. Heft, Jr.
FRANK W. HEFT, JR.
Chief Appellate Defender of the Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioners

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS - - - Petitioner

versus

DONALD E. BORDENKIRCHER, Warden - Respondent

AND

JAMES WILLARD SUMMITT - - - Petitioner

versus

DONALD E. BORDENKIRCHER, Warden - Respondent

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

STEVEN L. BESHEAR
Attorney General

VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

On the Brief:

JOSEPH R. JOHNSON
Assistant Attorney General

PENNY R. WARREN
Assistant Attorney General

INDEX

	PAGE
Opinions Below	1– 2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Counterstatement of the Cases	2– 6
Summary of Argument	7– 8
Argument	8–29
Conclusion	29
Certificate of Service	30

TABLE OF AUTHORITIES

Cases:

PAGE

Gilbert v. California, 388 U. S. 263 (1967) 12

Jackson v. Denno, 378 U. S. 368 (1964) 19, 20, 21

Kirby v. Illinois, 406 U. S. 682, 690 (1972) 13, 15

Manson v. Brathwaite, 432 U. S. 98, 113 (1977) 15, 17, 20, 26, 27

Neil v. Biggers, 409 U. S. 188, 198 (1972) 15, 17, 22, 27

Pinto v. Pearce, 389 U. S. 31 (1967) 20

Stovall v. Denno, 388 U. S. 293 (1967) 15, 16, 17

Summitt v. Commonwealth, Ky., 550 S. W. 2d 548 (1977) 1

Summitt and Watkins v. Bordenkircher, 608 F. 2d 247 (6th Cir. 1979) 2

United States v. Ash, 413 U. S. 300 (1973) 13, 15

United States v. Wade, 388 U. S. 218 (1967) 8, 9, 10, 11, 12, 13, 16

Watkins v. Commonwealth, Ky., 565 S. W. 2d 630 (1978) 1, 28

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JAMES WILLARD SUMMITT - - - *Petitioner*

v.

DONALD E. BORDENKIRCHER, Warden - *Respondent*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The Supreme Court of Kentucky published separate opinions for each petitioner. The opinions are reported in *Watkins* v. *Commonwealth,* Ky., 565 S. W. 2d 630 (1978) (Appendix, hereinafter designated App., pp. 35-37) and *Summitt* v. *Commonwealth,* Ky., 550 S. W. 2d 548 (1977) (App., pp. 112-116). In each petitioner's case the opinion of the United States District Court for the Western District of Kentucky is not reported (App., pp. 38-45, 117-120). The United States Court of Appeals for the Sixth Circuit con-

solidated each petitioner's case and its opinion is reported as *Summitt and Watkins* v. *Bordenkircher,* 608 F. 2d 247 (6th Cir. 1979) (App., pp. 47-58).

JURISDICTION

In each case the order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 (App., pp. 59, 122). The petitions for writs of certiorari were granted on March 17, 1980 (App., pp. 123-124). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether Constitutional Due Process Requires the Determination of the Admissibility of Evidence To Be Made Out of the Hearing of the Jury.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions petitioners have invoked are the Sixth and Fourteenth Amendments to the Federal Constitution.

COUNTERSTATEMENT OF THE CASES

Summitt v. *Bordenkircher*

Petitioner James Willard Summitt was indicted for rape in Jefferson County, Kentucky. Upon a jury verdict of guilty, Summitt was sentenced to life imprisonment (App. 111).

The Commonwealth's first witness was Detective Rick Sanders of the Jefferson County Police Department (App. 60). He stated that on July 21, 1974, at 11:30 p.m. he was called to interview a rape victim at Louisville General Hospital (App. 61-62). She described her assailant as a white male in his thirties, five feet, nine inches tall, one hundred and eighty to one hundred and ninety pounds, with a rough complexion and tattoos on both arms and was called "Jimbo." (App. 63). She looked at over 1200 pictures at the county police station the day of the rape but could not identify her attacker (App. 66) Next day she went to the city police station and went through several more photograph books (App. 68) . Upon finding Summitt's picture she stated, "This is the man that raped me. There's no doubt about it, this is Jimbo, the man that raped me." (App. 64). Detective Sanders further testified that the victim had reported that at 1:30 a.m. on July 21, 1974, Summitt forced her from a phone booth into a 1967-69 white Chevrolet with a black hard top and drove her to a gravel road where he raped her (TE 63-64).

The victim testified that while she was walking to a phone booth at the corner of Taylor Boulevard and Bicknell in Louisville, Kentucky, a man drove up and ordered her into the front seat of his car so that she was sitting between Summitt and another man (App. 71). She stated that it was shortly after midnight and she had just gotten off work from the Parkside Restaurant when she was abducted (App. 72). After driving out on a gravel road, Summitt told her to take

off her clothes and when she refused he hit her and raped her. *Id.* The two men then took her back to her car (App. 73). She stated that at the time of the rape, Summitt had a mustache and longer hair but she stated "I know it's definitely him." *Id.*

The victim stated that she had struck Summitt in the face "pretty hard" and that he started bleeding (App. 81). Summitt forcibly took off her clothes and she was raped in the front seat of the car (App. 82). She stated that she was with Summitt and his companion for about forty-five minutes (App. 85). She also stated that she had seen Summitt's face distinctly in the light on the night she was raped and that he was wearing a tank top and had tattoos on his arms (App. 97).

Summitt testified for the defense (App. 98). He stated that around August 14 or 15, his parole officer informed him that he had a warrant for his arrest for rape (TE 169). He stated that the first time he saw his alleged victim was in the courtroom (TE 166).

The court later requested that Summitt roll up his sleeves. He complied and exhibited the tattoos on his arms (App. 100).

Watkins* v. *Bordenkircher

Petitioner John Gregory Watkins was indicted for first-degree robbery in the attempted robbery of the Thoroughbred Liquor Store in Louisville, Kentucky and for first-degree assault in the wounding of an employee of the store, Donald L. Goeing, Sr., which occurred during the course of the attempted robbery.

Watkins was convicted on both counts and was sentenced to the maximum of twenty years on each count, the sentences to run concurrently (App. 33-34).

The Commonwealth's first witness was Walter Smith, an employee of the Thoroughbred Liquors (App. 7). He stated that around 11:30 p.m. on January 11, 1975, Watkins, along with three other men, entered his store and Watkins asked for a pack of cigarettes. *Id.* As Smith turned to obtain the cigarettes, Watkins announced that, "This is a hold-up." *Id.* Smith further testified that his co-worker, Donny Goeing, was putting soft drinks into a machine and when Watkins saw this movement by the machine, Watkins stated, "I said don't reach for anything" and shot Goeing twice (App. 9). After firing the shots, Watkins and his companions ran out the door (App. 10).

Smith further testified that he gave the police a description of Watkins as being a black male with a moustache and wearing a light-colored shirt. Watkins' companions had darker skin (App. 11-12). Smith stated that he saw Watkins' face when he turned around with the cigarettes (App. 10). He expressed no doubt whatsoever that Watkins was the man who had pulled out the gun and shot Goeing (App. 16).

The Commonwealth's next witness was Donald Goeing (App. 17). He stated that on January 11, 1975, at around 11:30 p.m., Watkins walked into the Thoroughbred Liquors. When Goeing turned around upon hearing Watkins state, "This is a hold-up," he was shot twice by Watkins (App. 18). Goeing made an

in-court identification of Watkins stating "I'd know his face any place." Id. Goeing testified that Watkins shot him once through the right ventrical of the heart and once through the arm. *Id.*

Goeing testified that he had been stocking the cooler with cold drinks and that he had been standing face to face with Watkins just prior to being shot (App. 19). He testified that the soft drink cooler was located to the side of the cash register (App. 20).

Goeing testified that he described his assailant to the police as wearing light tan clothing, having light skin coloring and being young (App. 21). Goeing further stated that he was in the hospital some twelve days and was told by the police that they were going to bring someone in to see if he could identify him (App. 21-22).

The Commonwealth's next witness was Officer Dennis Ferrell (App. 24). He testified that when he took Watkins to the hospital, Goeing identified him (App. 26). Officer Ferrell further testified that when he took Watkins down to the station for a lineup, there were three black males but that Watkins had lighter complexion than the other two (App. 26-27).

Watkins testified that he did not go into the Thoroughbred Liquor Store on the night of January 11, 1975, and denied that he had seen Goeing prior to seeing him in the hospital (App. 30-21).

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel at post-indictment confrontations is based on a critical stage of the proceedings. The reasoning behind such confrontations being a critical stage of the proceedings is just as applicable and supportive of concluding that in-camera determinations of the admissibility of evidence are not critical stages with attendant right of counsel.

A right to an in-camera hearing cannot be based upon an extension of the right to counsel where no right to counsel exists. There is no right to counsel at photographic identifications or at corporal confrontations during a routine police investigation. The standards of due process strike the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime. Due process is not violated by admission of identification testimony so long as the identification possesses sufficient aspects of reliability under the totality of the circumstances.

Petitioners were not denied due process by the trial courts' determination of admissibility in the presence of the jury. Petitioner Summitt's photographic identification procedure was devoid of any hint of suggestiveness. An in-camera hearing on a non-existent question of admissibility would frustrate rather than promote justice. Petitioner Watkins' in-court identifications were admissible under the Wade test of independent source. An in-camera hearing would have

answered this question before trial but the result would be a duplication of evidence needed by the jury on the issue of credibility.

Analysis of the facts present in each case indicates that under existing standards neither petitioner was denied his due process right of a fair trial with no substantial likelihood of an irreparable misidentification. A per se rule of exclusion in such instances peremptorily keeps evidence from the jury that's both reliable and relevant.

ARGUMENT

Constitutional Due Process Does Not Require the Determination of the Admissibility of Evidence To Be Made Out of the Hearing of the Jury.

A.

Each petitioner claims the trial court denied him a constitutional right by failing to hold a requested pretrial hearing. Prior to each trial each petitioner moved for an in-camera hearing. Petitioner Summitt based his motion on the fact he was identified from a photograph; Watkins claimed a right to have counsel present. Both of these motions were some time after exhaustive discovery proceedings had taken place. Following a lengthy discussion Watkins' motion was denied (Watkins T.E. pp. 2-11). Summitt's oral motion was denied at trial (App. 60). These denials of an in-camera determination of the admissibility of evidence lead petitioners to now claim that *United States* v. *Wade,* 388 U. S. 218 (1967) gives them a constitutional right to the hearing.

The constitutional ruling in *Wade* was an extension of the Sixth Amendment right to counsel outside the then traditional bounds of a trial. The rationale of that extension is just as forceful in determining that there is no compelling interest in extending that right to require an in-camera determination of the admissibility of evidence.

The nexus of *Wade* was that at this stage of confrontation the defendant alone could not cope with the power of the government. Further, it was likely that later, with counsel, he would be unable to cure any defects in the confrontation.

The rationale was later refined to apply only to in personam confrontations occurring after the initiation of adversarial proceedings where the defendant would be unable to cure any defects at trial. Simplifying this *Wade* "criticality" test, (1) there must be an *in personam* confrontation (2) after the initiation of adversarial proceedings (3) which cross-examination would be inadequate to cure at trial.

A lack of confrontation was essential in determining that the right to counsel did not extend to photographic identifications. The logistical problems involved could never be better illustrated than in Summitt's case. The necessity of counsel for each of the more than 1200 persons whose pictures were viewed would have been a chaotic burden on the orderly administration of justice.

Just as logical was the next element, the lack of "criticality" in preindictment situations where the

adversarial lines have not yet been drawn. This was of course the situation of petitioner Watkins.

If the first two elements are affirmatively present, then the final question is whether or not there are adequate means to cure any defects at trial. If it appears not, then there is a right to counsel at the confrontation. Should, as is the case for both petitioners, there be no post-indictment confrontation, there remain only the due process rights discussed below.

Analysis of the facts indicates that neither petitioner had a right to counsel at the identification process itself. There remains only the due process right that there be no substantial likelihood of irreparable misidentification. Application of the above test would indicate that cross-examination at trial, coupled with the available pretrial discovery and witness accessibility, would be adequate protection. Thus an in-camera hearing to determine the admissibility of evidence is not a critical confrontation mandating the right to counsel.

B.

Petitioners assert that due process requires an in-camera hearing on the admissibility of identification evidence as an extension of the Sixth Amendment right to counsel established in *United States* v. *Wade,* 388 U. S. 218 (1967). To analyze this claim it is necessary first to consider the policies and concerns *Wade* was designed to effectuate.

1. A historical view of *United States* v. *Wade* demonstrates the context of the Sixth Amendment guarantee of counsel.

Six weeks after Wade was indicted and two weeks after counsel was appointed Wade was compelled to appear in a lineup without any notice to his counsel. In determining this procedure violated Wade's right to counsel, this Court considered the traditional limitation of a right to counsel to the trial itself when a defendant for the first time confronted his accusers and the evidence against him. The historical context was compared to current practices with organized police forces where critical confrontations of the accused by the prosecution occur at pretrial proceedings, the results of which often settle the accused's fate and reduce the trial to a mere formality. The general rule was that an accused is entitled to the presence of counsel at, or else the exclusion of any evidence derived from, a critical pretrial confrontation where the accused stands alone against the overwhelming resources of the state and the absence of counsel would deny him effective representation at the only stage when legal aid and advice would help him. Examples of such confrontations include: the arraignment where defenses were lost if not then asserted,[1] secretly arranged and overheard meetings with an accomplice turned informant[2] and custodial interrogations.[3]

Post-indictment lineups and showups were considered "critical stage" confrontations because of the

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[1] *Powell* v. *Alabama*, 287 U. S. 45 (1932).
[2] *Massiah* v. *United States*, 377 U. S. 201 (1964).
[3] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

history of suggestiveness in the manner the accused was presented to witnesses, the secrecy surrounding such confrontations with a resulting gap in knowledge, and the accused's inability to credibly reconstruct for the jury any suggestiveness or unfairness in the confrontation procedure.

The accused not only might not recognize or appreciate any suggestiveness in the procedure but also would be faced with the dilemma of foregoing his right not to testify in order to present this evidence. Given the secrecy, the gap in knowledge and the inability to reconstruct the critical pretrial confrontation, "the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." *Wade* at 235. No substantial countervailing policy against a right to counsel at post-indictment lineups and showups was advanced. In *Wade,* and in *Gilbert* v. *California,* 388 U. S. 263 (1967), counsel had already been appointed and no argument was made that notice to counsel would have prejudicially delayed the confrontations.

This Court acknowledged that legislation or regulations which eliminated "the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" *Wade* at 239. More systematic or scientific proceedings were encouraged to lessen the impediment to reconstruction of the conditions bearing upon the reliability of the process.

Five years later this Court declined to extend the *per se* exclusionary rule to a police station showup occurring before the defendant was formally charged. The Sixth and Fourteenth Amendment right to counsel is applicable only to "criminal prosecutions." *Kirby* v. *Illinois,* 406 U. S. 682, 690 (1972).[4] The delay accompanying a constitutional right to counsel would likely impede prompt investigations, cause extended detention of innocent suspects and diminish the reliability of identification as the witness's memory fades.

The next year it was held that the Sixth Amendment does not guarantee a right to counsel at photographic identification displays. *United States* v. *Ash,* 413 U. S. 300 (1973). Photographic identifications were considered analogous to pretrial interviews with witnesses. No confrontation is involved and the subsequent trial provides adequate opportunities to cure any defects from inadvertent suggestiveness or abuse; i.e., the photographic display is not a "critical" confrontation. In *Ash,* this Court cautioned against the drastic expansion of the right to counsel which would result if the *Wade* test were applied out of context.

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[4]For it is only [at or after the initiation of judicial criminal proceedings] that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.

* * *

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. *Kirby* at 689-690.

2. Petitioners were not entitled to the presence of counsel at the identification procedures.

It is clear from the foregoing analysis that petitioners were not deprived of a right to counsel at a critical pretrial confrontation. Indeed, no such claim is made. Summitt was identified from more than 1200 photographs viewed by his victim within two days of the incident. Watkins was identified by a critically wounded robbery victim at a hospital showup and then by another victim at a lineup. All identifications occurred during routine investigatory stages before adversary proceedings were formally initiated, and long before indictments were returned.[5]

Wade was deprived of his right of cross-examination because of inequality in the adversary process at a critical pretrial confrontation. Petitioners were not similarly handicapped. While they claim they were forced at trial to "probe in the dark in an attempt to discover and reveal unfairness," the record reflects that a great deal of light had been shed on the identification proceedings prior to trial. Summitt moved for and was granted discovery of all photographs viewed by his rape victim (Summitt TE 7-9, 12). Similarly, Watkins discovered and introduced at trial a photograph of the lineup and information concern-

[5]Petitioner Summitt was identified by photo on July 23, 1974, two days after the rape occurred. He was arrested after July 31 and indicted September 19, 1974 (TE 63-64, 233; App. 2).

Petitioner Watkins was identified January 13, 1975, two days after the robbery. Charges were placed against him after the identifications. He was indicted March 25, 1975 (TE 59, 61, 64; App. 1).

ing the hospital showup (Watkins TR 3-6, 11-13, 19-22; App. 76). The defense counsel had equal access with the prosecutor to witnesses for pretrial interviews, an equal opportunity to reconstruct the identification procedures for the jury, and an equal opportunity to attack the credibility of evidence through cross-examination. Petitioners' claims of impediments to meaningful cross-examination are not supported by the records.

The historical spirit and continuing purpose of the Sixth Amendment guarantee of counsel is to remove inequality in the adversary process, not to protect against prosecutorial abuse. *Ash, supra* at 319-320. In those identification cases where the right to counsel is not applicable, this Court has consistently held that due process standards provide adequate safeguards against prosecutorial abuse or suggestive identification procedures.[6]

3. Due Process does not compel a *per se* requirement of an in-camera hearing on identification procedures to protect against the likelihood of misidentification.

Petitioners argue that the standards of due process compel a *per se* constitutional requirement of an in-camera hearing on identification testimony when re-

[6] *Stovall* v. *Denno*, 388 U. S. 293 (1967) (a hospital showup the day following the crime); *Simmons* v. *United States*, 390 U. S. 377 (1968); *Kirby* v. *Illinois*, 406 U. S. 682 (1972) (a preindictment police staion showup); *United States* v. *Ash*, 413 U. S. 300 (1973) (a post-indictment photographic display); *Neil* v. *Biggers*, 409 U. S. 188 (1972) (a preindictment station-house showup); *Manson* v. *Brathwaite*, 432 U. S. 98 (1977) (a photographic showup).

quested by the defendant. But the cure sought by petitioners proves worse than the disease. Such a requirement would bog down already overcrowded court dockets with hearings in cases where there was no indicia of suggestive identification procedure.

An example of this is apparent in Summitt's frivolous demand for a hearing. The victim, having viewed the rapist for about 45 minutes, gave a very accurate description including the tattoo portion to the police prior to the photo viewing. She unequivocally identified Summitt as soon as she saw his picture and did not identify anyone prior to that. Since defense counsel knew or had access to all of this information, he was aware that any question of admissibility was non-existent. All that remained was the jury question of credibility.

Similarly, in-camera hearings would be required when the pretrial procedure was suggestive but necessary and otherwise reliable, as in *Stovall* v. *Denno,* 388 U. S. 293 (1967). Much of the evidence relevant to the issue of admissibility is also relevant to the issue of credibility and would have to be repeated before the jury. When there is no indication that identification testimony would be inadmissible, the in-camera hearing would be not only a time-consuming duplication but also an exercise in futility. If this Court should accept petitioners' claims and remand the cases for hearings, what possible effect would the hearings have? Absolutely none. The record in Watkins establishes the in-court identifications were admissible under the *Wade* test of independent source. De-

fense counsel had the information necessary to wage an effective attack on the witnesses' identification testimony at trial. The record also reflects that the original motions for suppression hearings provided no facts to support a belief that any in-court identification was irreparably tainted by unnecessary and suggestive pretrial procedures (App. 3, 60). The trial court did not abuse its discretion by denying the motions for in-camera hearings.

It must be remembered that "it is the likelihood of misidentification which violates a defendant's right to due process." *Neil* v. *Biggers,* 409 U. S. 188, 198 (1972). The due process test of *Stovall, supra,* protects an *evidentiary* interest.[7]

Wade and its companion cases reflected three concerns. The first was that "the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Manson* v. *Brathwaite,* 432 U. S. 98, 112 (1977). While an in-camera hearing furthers this policy, a *per se* constitutional requirement goes too far. If ex-

[7]It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process.

Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi. *Manson* v. *Brathwaite,* 432 U. S. 98, 113 (1977) (footnote 14) (citations omitted).

perience is any guide, it is the rare case in which the identification procedures are violative of due process,[8] yet an in-camera hearing will be required in *every* case where the defendant requests it. The concerns of reliability can be adequately met by a flexible standard of trial court discretion to hold a hearing or to declare a mistrial when the interest of justice requires. Appellate review would still be available under due process standards.

The second factor was deterrence. It is difficult to see how this factor would be affected one way or the other by removing the admissibility hearing from the jury's presence.

The third factor is "the effect on the administration of justice." It is here that the *per se* approach must fail. If identification testimony is to be subject to an in-camera hearing solely because it may be unreliable, then what would preclude a similar requirement for all potentially unreliable evidence? Should all witnesses' testimony be subject to an in-camera hearing? Must the admissibility of all evidence be decided prior to trial when requested? Shall we have two separate trials, one for admissibility and one for credibility? Just how far do we go and still have a trial which protects both society and the defendant? Court dockets are crowded enough without adding hearings which are largely duplicative and serve little purpose.

In short, cross-examination at trial provides the necessary confrontation to test the reliability of evidence. Trial courts have discretion to hold hearings

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[8]See *Foster* v. *California*, 394 U. S. 440 (1969).

out of the presence of the jury when the interest of justice requires. Due process standards protect against the substantial likelihood of irreparable misidentification. A constitutional requirement of in-camera hearings on the admissibility of evidence is not warranted.

C.

Jackson v. *Denno,* 378 U. S. 368 (1964) does not support a requirement for an in-camera hearing on the admissibility of identification evidence. Petitioner equates the determination of admissibility of identification evidence in the presence of the jury with the rule struck down in *Jackson.* There the jury determined not only the reliability of a confession but also its voluntariness or admissibility as evidence.

The two situations are not comparable. Unlike a coerced confession, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Considerations urging the exclusion of evidence tainted by a constitutional violation do not bear on the present question.

Nor does the jury determine the admissibility of identification evidence as was the case with confessions in *Jackson.* That procedure was condemned on the grounds that due process is violated if a conviction is based, even in part, upon an involuntary confession. *Id.* at 376. Since the *Jackson* jury was required to carefully consider the confession, decide the legal question of its voluntariness and then decide the factual question of its credibility, it could not be assumed that

the jury made a reliable determination of voluntariness. *Id.* at 386-387.

By contrast, the admissibility of identification evidence, like any other evidence, is determined by the judge upon timely objections at trial. If the objection is sustained, the evidence is not heard or is stricken or a mistrial is declared, depending upon which relief is sought and the prejudice caused. These rulings are binding upon the jury and are subject to appellate review. Only when evidence is ruled admissible by the judge may the jury then decide the factual issue of credibility or weight of the evidence.

Petitioners were perhaps confused because in identification cases the word "reliability" is often used to describe both the test for admissibility (the legal question) and the test for credibility (the factual question). Although much of the same evidence may bear on both issues, the determinations are separate and distinct, the former being made by the judge and the latter by the jury. Respondent submits that when this Court concluded "reliability is the linchpin in determining the admissibility of identification testimony,"[9] it in no way implied that admissibility is a question for the jury as petitioners infer in their Brief.

The holding of *Jackson* was that convictions could not be based on involuntary confessions. *Id.* at 376. Under these circumstances, it is not surprising that in *Pinto* v. *Pearce,* 389 U.S. 31 (1967) it was stated, "it would seem *prudent* to hold voluntariness hearings out of the presence of the jury." (Emphasis added.) Pru-

[9] *Manson* v. *Brathwaite,* 432 U. S. 98, 114 (1977).

dent practice does not translate into a *per se* constitutional requirement.[10]

Since convictions can be upheld despite suggestive identification procedures and since evidence on admissibility is also relevant to credibility, strong arguments can be advanced for holding admissibility hearings in the presence of the jury.

Petitioners' reliance upon *Jackson* v. *Denno* is misplaced. The circumstances surrounding determinations of admissibility are not comparable and, in fact, lead to the opposite conclusions.

D.

Petitioners were of course entitled to their due process rights of a fair trial and since in identification

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[10]Federal Rule of Evidence 104(c):

Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

Advisory Committee's Note

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

cases it is the likelihood of misidentification which violates a defendant's right to due process, we should examine each case.

In this analysis we utilize the factors set forth in *Neil* v. *Biggers,* 409 U. S. 188 (1972).[11] These factors are applicable only if the prior lineup or showup was suggestive. The prior identification of Summitt was not suggestive. The victim identified her assailant from over 1,200 photographs viewed two days after the rape. The police were not with her during the viewing. Defense counsel's hearing request was frivolous on its face. In *Watkins,* the hearing request was not based on alleged suggestiveness of the lineup at the police station and showup at the hospital, but rather on the absence of counsel. However, when viewed in light of the facts of the case, that hearing request was also frivolous.

In spite of the fact that the requests were frivolous, the factors may be applied as follows:

SUMMITT *v.* BORDENKIRCHER

(1) *The victim's opportunity to view Summitt.*

The victim testified that she was in the company of Summitt for about forty-five (45) minutes from the time she was forced into Summitt's car until she was

[11] [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior descripion of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Biggers* at 199-200.

returned to her car after Summitt had raped her (App. 85). She stated that she was forced to sit in the front seat of the car wedged in between Summitt and another man (App. 71) and although the rape had occurred after midnight, at times she was able to clearly see his face in the light (App. 97). She testified that when Summitt struck her, she struck him back causing his face to bleed (App. 81).

(2) *The victim's degree of attention.*

The victim fought with her assailant when he tried to take off her clothes and rape her (App. 81). She was able to describe in detail where she was driven prior to the rape (TE 63-65; App. 78-80).

(3) *The accuracy of the victim's prior description of Summitt.*

The victim described her assailant as a white male in his thirties, five feet, nine inches tall, one hundred and eighty to one hundred and ninety pounds with a rough complexion and tattoos on both arms (App. 63).

Summitt testified at trial that he was thirty-four years of age (TE 157) and at the court's request he displayed his tattoos to the jury (App. 100). She stated that at the time of the rape, Summitt had a mustache and longer hair but added "I know its definitely him" (App. 73). She stated that Summitt was wearing a tank top on the night of the rape.

(4) *The victim's level of certainty demonstrated at the out-of-court identification.*

When the victim came across Summitt's photograph at the police station, she positively identified Summitt

and had no doubt whatsoever that he was the man who had raped her (App. 64). She identified Summitt from some 1,200 photographs (App. 67).

(5) *The length of time between the crime and the out-of-court identification.*

The victim identified Summitt from his photograph two days after she had been raped (App. 64).

WATKINS *v.* BORDENKIRCHER

(1) *Opportunity to view at the time of the crime.*

Walter Smith testified that he was working behind the counter of the liquor store when Watkins came up to the counter and asked for a pack of cigarettes (App. 7). When he turned to get the cigarettes and then turned back around Watkins pronounced that it was a "hold-up" and was holding a .38 caliber pistol (App. 10). Smith testified that his partner, Donald Goeing, was putting cold drinks into a machine and when Watkins saw movement by the machine he shot Goeing twice (App. 9).

Donald Goeing testified that he and Walter Smith were both working behind the counter when Watkins walked into the liquor store and ordered a pack of cigarettes (App. 18). He then heard Watkins state, "This is a hold-up" and when Goeing turned around, he was shot twice by Watkins.

(2) *The witness' degree of attention.*

Smith testified that he was waiting on Watkins who asked for a pack of cigarettes at the time Watkins shot

Goeing (App. 7-9). There were no other customers in the store at the time of the shooting (App. 10). However, Smith noticed that Watkins was accompanied by three other men (App. 7). Goeing testified that he also heard Watkins pronounce that this was a "hold-up" moments before he was shot (App. 18). He further stated that he had been standing "face to face" with Watkins just prior to the shooting (App. 19).

(3) *The accuracy of the prior descriptions.*

Smith gave a description to the police that Goeing's assailant was a black male with a moustache who had a somewhat light conplexion (App. 11-12). He recalled he may have told the police that Watkins was "around 30" when in fact Watkins was seventeen years of age at the time of the shooting (App. 13, 31).

Goeing testified that his assailant was young and had light skin coloring (App. 21).

(4) *Level of certainty demonstrated at the confrontation.*

Smith picked out Watkins at a lineup of three black males (App. 26).

Goeing identified Watkins from his hospital bed but also stated that "it could have been his twin brother" (App. 23-26).

(5) *Length of time between the crime and the confrontation.*

Smith identified Watkins in a lineup two days after the shooting (TE 59, 61).

Goeing identified Watkins from his hospital bed on the day Watkins was arrested about two days after the shooting (App. 25-26).

These factors do not suggest, as petitioners claim, that they were entitled to a hearing out of the presence of the jury. In fact, they indicate that the likelihood of irreparable misidentification was non-existent.

E.

Petitioners' advocacy for a rigid exclusionary rule with regards to any and all "suggestive evidentiary identification procedures," has been considered previously by this Court. "Certainly, inflexible rules of exclusion, that may frustrate rather than promote justice, have not been viewed recently by this Court with unlimited enthusiasm." *Manson, supra* at 113. Flexibility is inherent and indeed required by due process considerations.

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature. *Manson* at 116.

Again, the lens through which we must view the evidence is the "totality of the circumstances"[12] with

[12]The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment. Stovall, with its reference to the *"totality of the circumstances"* and Biggers, with its continuing stress on the same totality, did not, singly or together, establish a strict exclusionary rule or new standard of Due Process. . . . We therefore conclude that *reliability* is the linchpin in determining the admissibility of

(Footnote continued on following page)

the issue being whether the identification was so unreliable as to create a substantial likelihood of misidentification.

In commenting on due process, the Sixth Circuit said in *Summitt:*

> A defendant is denied due process *only when the identification evidence is so unreliable that its introduction renders a trial unfair.* As long as there is not a *substantial likelihood of misidentification,* it is the function of the jury to determine the ultimate weight to be given the identification. At 253 (emphasis added)

Where the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

The focus upon "reliability" and on analogous factual situations are further evidenced and buttressed by *Biggers.*

The facts in *Biggers* provide for an interesting comparison with the present case. In *Biggers,* where the defendant was accused of rape as in *Summitt,* the victim had spent considerable time with her assailant, had given the police a description of him, and testified

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(Footnote continued from preceding page)

identification testimony for both pre and post Stovall confrontations. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself. *Manson* at 114 (emphasis added).

at the trial that she had *"no doubt"* about her identification of the accused and that there was *something about his face "I don't think I could ever forget."* (emphasis added).

In *Watkins,* witness Donald Goeing stated emphatically upon identifying defendant in court, *"I'd know his face anyplace"* (emphasis added), and in *Summitt,* the witness-victim stated unequivocally, after examining numerous photographs, *"This is the man that raped me. There's no doubt about it, this is Jimbo, the man that raped me."* (emphasis added).

We submit that the due process standard to which all eyewitness evidentiary evidence must be measured is one of relevancy and reliability. As so aptly stated in *Manson:* ". . . the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." At 106. Again, in neither of these cases were there suggestive or unnecessary identification procedures. In such instances, a *per se* rule of exclusion would go too far since its application automatically and peremptorily keeps evidence from the jury that is reliable and relevant.

Given this analysis and the emphasis on reliability, together with the evidence at trial, it is strongly submitted that an in-camera hearing to determine admissibility of eyewitness identification testimony is not constitutionally mandated. The identification evidence introduced at trial was sufficiently reliable to eliminate

any substantial likelihood of irreparable misidentification when viewed in light of the totality of the circumstances of these cases.

CONCLUSION

The respondent submits that there is no constitutional due process right to have the admissibility of evidence determined outside the hearing of the jury.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

VICTOR FOX
Assistant Attorney General
Captol Building
Frankfort, Kentucky 40601
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Victor Fox, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioners by depositing three copies of same in the United States mail, first class postage prepaid, on August 14, 1980, addressed to counsel for petitioners, Hon. Frank W. Heft, Jr., Chief Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202.

Victor Fox

VICTOR FOX
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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Nos. 79-5949 and 79-5951

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Petitioner,

V.

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DONALD E. BORDENKIRCHER, WARDEN,

Respondent;

and

JAMES WILLARD SUMMITT,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

FRANK W. HEFT, JR.
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioners

DANIEL T. GOYETTE
Chief Deputy Public Defender
Jefferson District Public Defender
of Counsel

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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REPLY BRIEF FOR PETITIONERS

QUESTION PRESENTED

DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE?

PURPOSE OF THE BRIEF

The petitioners, John Gregory Watkins and James Willard Summitt, respectfully submit that the legal arguments supporting their position on the issue presented are adequately set forth in the brief for the petitioners. However, the petitioners find it necessary to respond to Subsection D of the argument made in brief for the respondent. This reply brief seeks to demonstrate that an analysis of the factors enunciated in Neil v. Biggers, 489 U.S. 188 (1972) indicates the unreliability of the identifications made by witnesses in the respective cases.

No. 79-5949 - WATKINS V. BORDENKIRCHER

1.) The opportunity of the witnesses to view the criminal at the time of the crime.

Walter Smith, who was working at the liquor store counter at the time of the robbery, said that four men came into the store and he was asked for a pack of cigarettes by one of the men. As Smith turned around to get the cigarettes the man said, "This is a hold-up." (Appendix, hereafter App., p. 7). According to Smith, Donald Goeing, an employee of the store, had been stocking a cooler and when Goeing made a movement, he was immediately shot twice. The men then ran out of the door (App., pp. 7-10).

Goeing said he saw his assailant's face for about five seconds as he turned around from the cooler and was shot. He then passed out (App., p. 20).

2.) The witnesses's degree of attention.

Smith and Goeing both said that the assailant was a stranger and they had no reason to pay particular attention to him (App., pp. 8, 19-20).

3.) The accuracy of the prior description.

Smith described the assailant as a light-skinned, black male, about thirty years old, approximately five feet, nine inches tall.

He stated that the assailant wore a light-colored shirt, and possibly, a mustache. Smith did not estimate the assailant's weight (App., pp. 11-13).

The only description given by Goeing was that the assailant was a young, light-skinned man wearing tan clothing (App., p. 21).

The police report issued on the night of the robbery described the assailant as a black male, thirty-five years old, five feet nine inches tall, weighing one hundred seventy-five pounds, and wearing a dark "slip-over" shirt (App., p. 5).

Petitioner Watkins was, in fact, seventeen years old at the time of the robbery. (App., p. 13).

4.) The level of certainty demonstrated at the confrontation.

Smith viewed a line-up containing Watkins and two other black males. The other two men had darker skin than Watkins (App., p. 26). Smith stated on cross-examination, "Well, I remember at that particular time [the line-up] saying that I wasn't completely sure at that time. But later, you know, later after I got myself together I knew that, I made, you know, that he was the man." (App., p. 16).

Two police officers brought Watkins to Goeing's hospital room to enable him to make an identification. Goeing was informed that the police were going to let him see someone he could identify (App., pp. 22, 28). Goeing stated, "I said it could have been close enough that it could have been his twin brother, it could have been somebody else." (App., p. 23).

5.) The length of time between the crime and the confrontation.

Smith attended the line-up two days after the robbery (App., p. 14).

The show-up in Goeing's hospital room apparently occurred two days after the robbery (App., pp. 25-26).

1.) The opportunity of the witness to view the criminal at the time of the crime.

Ms. Furgason testified that approximately thirty-five to forty-five minutes elapsed from the time she was abducted to the time she was returned to the automobile (App., pp. 71-73, 80, 85, 96-97). She said she could see her assailant's face from the light outside the Candlelight Bar where they drove before proceeding to the scene of the rape (App., pp. 72, 97).

2.) The witness' degree of attention.

Ms. Furgason stated that she did not pay any attention to the automobile in which she was riding (App., p. 81). Neither the direct nor cross-examination specifically indicates how much attention she paid to the two men with whom she was in the automobile.

3.) The accuracy of the witness' prior description of the criminal.

Detective Rick Sanders testified that Ms. Furgason described the rapist, who was a passenger in the automobile, as a white male, in his thirties, approximately five feet nine inches tall, 180 to 190 pounds, with a rough complexion and tattoos on both arms (App., p. 63). The man was nick-named "Jimbo" (App., p. 63). Her description of the driver of the car was that he was approximately six feet one inch tall, medium-length, light brown hair, 180 pounds, medium complexion, and wearing a mustache. The driver was referred to as "Willie" (App., p. 69).

Detective Sanders also said Ms. Furgason told him that the rapist wore a "tank top" shirt and that he did not recall her saying the rapist wore a mustache (App., pp. 70-71, 101). Ms. Furgason did not describe the tattoos worn by the rapist (App., p. 101).

Ms. Furgason stated that the men with whom she was in the car referred to each other as "Jimbo" and "Willie" (App., p. 79). She described the driver as a tall man with a big build and estimated that he was in his twenties (App., p. 84). She said that the man

who raped her wore a mustache and had hair longer than the length of petitioner Summitt's hair at trial (App., p. 73). She said the rapist wore a "tank top" shirt and had tattoos on the biceps of his arms (App., pp. 97-98).

Petitioner Summitt testified that he was thirty-two years old at the time of the crime (Transcript of Evidence, p. 157, herefter referred to as TE). He stated that he first saw Ms. Furgason in court and that he was required to exhibit the tattoos on his arms to her in a conference room sometime prior to the trial (App., pp. 98-99).

4.) The level of certainty demonstrated at the confrontation.

Ms. Furgason viewed numerous photographs contained in books kept at City and County Police Headquarters (App., pp. 66-68, 75). She said she recognized a photograph of Summitt (App., p. 75). Although the photograph was requested by defense counsel, it was never produced at trial (App., p. 106).

5.) The time between the crime and the confontation.

The rape occurred between 11:30 p.m. on July 20, 1974 and 1:30 a.m. on July 21, 1974 (App., p. 71). Ms. Furgason viewed photographs on July 21, 1974 and again on July 23, 1974 (App., pp. 63, 66-67, 88-90, 92). She made her identification of Summitt's photograph on July 23, 1974 (App., pp. 90-91).

The facts surrounding the crimes and identifications when considered in light of the arguments made in the original Brief for the Petitioners support the petitioners' position that a denial of constitutional due process of law resulted from the failure of the trial courts to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence.

CONCLUSION

For the reasons set forth in their original brief and in their reply brief the petitioners, John Gregory Watkins and James Willard Summitt, respectfully submit that the denial of a hearing outside the presence of the jury to determine the admissibility of identification evidence warrants a reversal of their convictions and the granting of new trials for each of them.

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONERS

DANIEL T. GOYETTE
CHIEF DEPUTY PUBLIC DEFENDER
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I, Frank W. Heft, Jr., counsel for petitioners, hereby certify that three (3) copies of the foregoing Reply Brief for Petitioners were mailed by depositing the same in a United States mailbox, with first class postage prepaid, this 31st day of October, 1980, to Hon. Victor Fox, Counsel for Respondent, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601.

FRANK W. HEFT, JR.

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